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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, *et al.*,

Petitioners,

v.

HERBERT M. COLLINS, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-3950

HERBERT M. COLLINS; H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; MILTON A. REID; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NORFOLK BRANCH; GEORGE BANKS; JULIAN HAZEL

Plaintiffs-Appellants,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; MASON C. ANDREWS; JOSEPH A. LEAFE; JOSEPH N. GREEN, JR.; CLAUDE J. STAYLOR, JR.; ROBERT E. SUMMERS; ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM; MARTHA H. BOONE; PAUL M. LIPKIN, members of the City of Norfolk Electoral Board; VINCENT J. THOMAS, Mayor of the City of Norfolk

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CA-83-526-N)

Argued: December 8, 1988 **Decided: August 18, 1989**

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Frank Ruff Parker (William L. Robinson, Samuel Issacharoff, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; James F. Gay, on brief) for Appellants. Robert Harvey Chappell, Jr. (Paul W. Jacobs, II, CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL; Philip R. Trapani, Harold P. Juren, OFFICE OF THE CITY ATTORNEY, on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

Seven black citizens of Norfolk, Virgina, and the Norfolk Branch of the National Association for the Advancement of Colored People appeal the district court's judgment denying their claim that the at-large system of voting for city council violates rights secured by the Voting Rights Act of 1965 as amended in 1982, 42 U.S.C. § 1973. The principal issue is whether the complainants have less opportunity than other members of the electorate to elect more than one councilman as the "representatives of their choice." § 1973(b).[1] The complainants assign error to the

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[1] Section 2 of the Act, 42 U.S.C. § 1973, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be

district court's construction of the Act with respect to the meaning of the statutory term "representatives of their choice." They also contend that the district court erred by giving undue weight to the election of a second black councilman after this action was filed. In accordance with the Supreme Court's mandate, we have reviewed the district court's judgment in the light of Thornburg v. Gingles, 478 U.S. 30 (1986).[2] Finding merit in the assignments of error, we reverse the district court's judgment and remand the case for further proceedings.

I

In Collins v. City of Norfolk, 605 F. Supp. 377, 382-85 (E.D. Va. 1984) (Collins I), the district court recounted the history of the government of the city from the grant of its royal charter in 1736 to the present. During the intervening years, there were various methods of electing the city council. Much of the time the common council was elected by wards, and the select council was chosen by members of the common council. In 1918, the city adopted a new charter, which provided for a city council of five members elected at-large. Since 1952 the council has consisted of seven members elected at-large. Council members serve four-year, staggered terms, so every two years three or four of the seven seats are contested, except on oc-

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considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[2] This action was commenced in 1983. The district court entered judgment for the city, Collins v. City of Norfolk, 605 F. Supp. 377 (E.D. Va. 1984) (Collins I), and this court affirmed, one judge dissenting, 768 F.2d 572 (4th Cir. 1985) (Collins II). The Supreme Court vacated this court's judgment, 478 U.S. 1016 (1986) (Collins III), and remanded for consideration in light of Thornburg v. Gingles, 478 U.S. 30 (1986). This court then reversed the district court's judgment and remanded for further proceedings, 816 F.2d 932 (4th Cir. 1987) (Collins IV). Upon remand, the district court entered judgment for the city. 679 F. Supp. 557 (E.D. Va. 1988) (Collins V).

casion when vacancies open more seats. All candidates compete for the open seats. The top three or four, as the case may be, are elected without any run-off. The elections are nonpartisan.

The district court also found that black voters in Norfolk were effectively disenfranchised by the Virginia Constitution of 1902. Among the devices used to limit black participation in elections were the literacy test, which remained in effect until the enactment of the Voting Rights Act of 1965, and the poll tax, which was declared unconstitutional in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). Prior to the passage of the Voting Rights Act, black voter registration was proportionately lower than that of whites. Now the facilities of the registrar's office are equally accessible to all citizens. The black voter registration rate and the turnout rate for council elections, based on the percentage of the black voting age population, are now greater than the registration and turnout rates of white voters. *See Collins I*, 605 F. Supp. at 384-85.

The 1980 census disclosed that Norfolk has a population of 266,979 persons of whom 60.8% (162,300) are white and 35.2% (93,987) are black. According to the census, the city's voting age population is 201,366 of whom 64.85% (130,595) are white and 31.48% (63,396) are black. *Collins I*, 605 F. Supp. at 382.

From 1918 until 1968, every member of Norfolk's city council was white. In 1968, Joseph A. Jordan, Jr., a black citizen, was elected to the council, and from that time until this action was filed the council had one black member. Jordan served until 1977 when he resigned, and Rev. Joseph Green, a black citizen, was appointed to fill the vacancy. Rev. Green was elected in 1978 and re-elected in 1982 and 1986. Although the city's population is 35% black and the rate of black participation in the electoral process is high, black citizens were unable to elect more than one black member (14%) to the seven-member council

until after this case commenced. Then in 1984, Rev. John Foster, a black citizen, was elected, under circumstances that will be discussed in part VI of this opinion. Since 1984, two black members (28%) have sat on the council simultaneously.

The district court construed the statutory term "representatives of their choice" to include successful candidates who received more than 50% of the black vote, even though unsuccessful candidates received a much higher percentage of the black vote. It also held that the election of Rev. Foster in 1984, after this action was commenced, and the subsequent re-election of incumbent black councilmen demonstrated that Norfolk's black citizens can elect representatives of their choice. These conclusions of the district court are critical in determining the validity of the district court's judgment. They are the subject of the complainants' primary assignments of error.

II

Section 2 of the Voting Rights Act of 1965 as amended in 1982 was enacted to prohibit the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color." The Act seeks to ensure that black citizens shall not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The Senate Report accompanying the 1982 amendments to the Act sets forth typical factors to be considered in determining whether the Act has been violated.[3] These factors are neither comprehensive nor ex-

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[3] 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political

clusive, and complainants need not prove any particular number of them. *Gingles*, 478 U.S. at 45. Minority voters do not have to prove that the electoral system was created or is maintained for a discriminatory purpose. Congress intended that a violation could be proved by showing discriminatory effect alone. *Gingles*, 478 U.S. at 35, 43-44.

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subdivision is racially polorized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07 (footnotes omitted).

The district court found facts pertinent to the Senate Report. *See Collins V*, 679 F. Supp. 557, and *Collins I*, 605 F. Supp. 377. Except as noted in this opinion, the complainants do not question these findings.

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The Supreme Court has long recognized that at-large voting in a multimember political unit, such as Norfolk's city council, may prevent minorities from electing representatives of their choice by diluting their voting strength. *See Gingles*, 478 U.S. at 47-48. The potential for this type of discrimination may be enhanced by staggered terms. *Cf.* City of Rome v. United States, 446 U.S. 156, 185 (1980). But at-large voting for multimember offices does not *per se* violate minority voters' rights. Minority voters how assert that at-large voting in multimember political units violates the Act must prove that this electoral system "operates to minimize or cancel out their ability to elect their preferred candidates." *Gingles*, 478 U.S. at 48. More specifically, when at-large voting is alleged to be the diluting device that violates the Act, complainants must prove three facts: 1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) that the minority group is politically cohesive; and 3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51.

Racial bloc voting—or as it is sometimes called, racially polarized voting[4]—is one of the factors the Senate Report identified as probative in determining whether the act has been violated.[5] *Gingles* recognized it as a key element of a vote dilution claim. 478 U.S. at 55. Racially polarized voting is important for two reasons. First, it is a means

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[4] *Gingles* uses these terms interchangeably throughout the opinion. *See* 478 U.S. at 52 n.18.

[5] *See supra* note 3.

of ascertaining whether minority groups constitute a politically cohesive unit. *Gingles*, 478 U.S. at 56.[6] The second purpose for inquiring about racially polarized voting is "to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56. It is in this aspect of the district court's analysis of racially polarized voting that we detect error.

Ascertaining whether legally significant white bloc voting exists begins with the identification of the minority members' "preferred candidates" or "representatives of their choice."[7] Then the court must inquire whether in general a white bloc vote normally will defeat the combined strength of minority support plus white "crossover" vote for the minority's preferred candidates. *Gingles*, 478 U.S. at 56.

Whether an electoral system impairs the ability of black citizens to elect "representatives of their choice" is a question of fact subject to the clearly erroneous standard of review. *Gingles*, 478 U.S. at 78-79. But this standard " 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' " *Gingles*, 478 U.S. at 79 (citations omitted). We

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[6] The district court found that Norfolk's black citizens vote sufficiently as a bloc to constitute a politically cohesive unit and neither side contests this finding. We need not discuss this aspect of polarized voting further.

[7] In the context of polarized voting, the Supreme Court differs over whether the race of the candidate is significant. *See Gingles*, 478 U.S. at 67-68 (irrelevant, plurality opinion); 478 U.S. at 82-83 (significant, White, J., concurring); 478 U.S. at 100-02 (significant, O'Conner, J., concurring); *see also Collins IV*, 816 F.2d at 936 n.3 (commenting on the different views). We need not pursue this issue to decide this case. Nevertheless, we will identify the race of the candidates by (W) for white and (B) for black.

cannot accept the district court's construction of the Voting Rights Act or its analysis of the facts based on its construction of the Act. These are errors of law or of mixed law and fact, which the clearly erroneous standard does not preclude us from correcting. *Gingles*, 478 U.S. at 79. The district court rejected the complainant's statistical analysis of election returns and accepted the city's. For the purpose of this opinion, we will refer only to the city's statistics.

III

We agree with the district court that the complainants have proved the first two elements of their cause of action. The court found that Norfolk's black population is sufficiently large and geographically compact to constitute a majority in two districts. The complainants contend that they would constitute a majority in three. In any event, the first element is satisfied. The district court also found that Norfolk's black citizens are politically cohesive. This satisfies the second element. It is the third element that the district court found lacking. The district court held that "Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate." *Collins V*, 679 F. Supp. at 566.

IV

The proper identification of minority voters' "representatives of their choice" is critical. The Act was intended to assure that minorities do not have less opportunity than other members of the electorate "to elect representatives of their choice." 42 U.S.C. § 1973(b). In *Collins IV*, we cautioned that great care must be exercised in identifying the minority's preferred candidates or representatives, saying:

> The mere election of a candidate who appears to have received votes from more than fifty percent

> of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice. Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of that minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

Collins IV, 816 F.2d at 937 (footnote omitted).

The district court treated successful candidates who received more than 50% of the minority vote as the minority's representatives of choice even though candidates who received a much higher percentage of the minority vote were defeated. *Collins V*, 679 F. Supp. at 568. In 1974, Lenious G. Bond (B) received 73.4% of the black vote; he was defeated. Elizabeth M. Howell (W) received 58.2% of the black vote; she was elected. Claude J. Staylor, Jr., (W) received 56.5% of the black vote; he was elected. The district court held that Howell and Staylor, rather than Bond, were the minority's representatives of choice. A similar situation arose in the 1980 election. Evelyn T. Butts (B) received 92.9% of the black vote; she was defeated. Howell (W) received 72.9% of the black vote; she was elected. The district court held that Howell, rather than Butts, was the minority's representative of choice. *Collins V*, 679 F. Supp. at 574-75.

According to the principles we explained in *Collins IV*, 816 F.2d at 937, Howell and Staylor are presumed not to be the minority's preferred candidates or representatives of choice. This presumption imposed on the city the burden of going

forward with evidence to rebut or meet the presumption. Fed. R. Evid. 301. The city relied chiefly on testimony that Howell and Staylor were endorsed by a black political organization, Concerned Citizens of Norfolk, and had black support greater than some of the lesser black candidates. The district court held that the presumption that Howell and Staylor were not the minority's representatives of choice was "overwhelmingly rebutted." *See Collins V*, 679 F. Supp. at 574-75.

The proof offered by the city is insufficient to overcome the presumption that Howell and Staylor were not the black community's representatives of choice. The Concerned Citizens' endorsement is not dispositive because it endorsed several candidates, black and white. Moreover, the difference between the level of black support for Howell and Staylor and the level of black support for black candidates who received less than 50% of the black vote is immaterial. Those black candidates who received few votes were not the black community's preferred candidates. As we clearly explained in *Collins IV*, 816 F.2d at 937, the critical fact is the difference between the black support for the candidate who received the most black votes yet lost and for the candidates who won with fewer black votes.

Gingles, quoting the Senate Report, emphasizes that " 'whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality" ' and on a 'functional' view of the political process." 478 U.S. at 45. Therefore, in addition to the bare statistics, it is appropriate to consider testimony revealing how political observers and the candidates themselves viewed the city's claim that Howell and Staylor were the minority's preferred candidates and representatives of choice. When questioned by the city's attorney, Rev. Green, a black member of the council who served with Howell and is a defendant in this action, testified:

> Q. Is Mrs. Howell looked upon in the black community as a representative of that community?
>
> A. Not as a representative of that community, but as a supporter of that community.

Exhibit Vol. I at 1616. William E. Swindell, Jr., a black deputy sheriff who is one of the complainants, also testified at trial that Howell is "not a representative of our community." App. Vol. I at 161. He explained: "Even though she receives black votes, she doesn't live in our community. She doesn't share our experiences." App. Vol. I at 160.

Howell's testimony also reveals that she cannot be considered to be the black community's representative of choice. While being thoroughly questioned on her sources of political support, Howell admitted that she had received high levels of black support in the past, but she did not characterize herself as a representative of the black community. Exhibit Vol. II at 1831. She testified: "There are problems in the black community right now which I don't care to be involved in, so I'm not." Exhibit Vol. II at 1855. Howell stated that she had no opinion on the issue of school busing. Exhibit Vol. II at 1854. She did not think that the black community of Norfolk had any special needs or interests. Exhibit Vol. II at 1904. She was unaware that black people in Norfolk had higher rates of poverty and unemployment and lower levels of education than whites. Exhibit Vol. II at 1899-1900.[8]

Staylor also did not consider himself to be the black community's candidate of choice. In 1974, Staylor was first elected to city council with black support after he resigned from a police officer's organization because it refused to admit black people. Exhibit Vol. I at 1604-05. He testified

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[8] The district court found that black persons in Norfolk generally do not fare as well as white persons with respect to income, education, housing, and employment. *Collins I*, 605 F. Supp. at 391.

that he voted against a proposal to build a memorial to Martin Luther King because he believed King was responsible for inciting riots, associated with communists, and was not a "patriotic, good American." Exhibit Vol. I at 1646-47. Staylor has also been an outspoken opponent of school busing. Exhibit Vol. I at 1659-63. In 1978, Staylor lost virtually all black support because of his position on issues of importance to black voters. Nevertheless, he was re-elected by white voters.

The district court's error in finding successful candidates who received over 50% of the minority vote to be the chosen representatives of the minority community, despite the fact that other candidates received a much greater percentage of the minority vote, is not simply technical or semantic. It is an error of mixed law and fact that defeats the Voting Rights Act's purpose of securing equal opportunity for minorities to "elect the representatives of their choice." By declaring that Howell in two elections and Staylor in one election were the chosen representatives of the black community, the district court was able to find that there was no significant white bloc voting. On this basis the district court held that the complainants had not satisfied the third requirement of *Gingles*, 478 U.S. at 51, for showing a violation of the Act.

A moment's reflection shows how the district court's method of identifying the black community's representatives of choice defeats a primary purpose of the Act. In 1974, 21 candidates sought the 4 open seats on the council. In 1980, 12 candidates vied for 3 open seats. In 1974, each voter—black and white—could cast four votes and in 1980 three votes. If black voters exercised their right to cast all of their allotted votes, they ran the risk that their second and third choices would be declared their preferred candidates. Only by single-shot voting—withholding all votes save for their first choice, and forfeiting the opportunity to cast all votes allotted to each voter—could the minority be assured that its second and third choices would

not be declared its preferred candidates. In contrast, under the at-large system, the white voters can freely cast all votes allotted to them without suffering the penalty imposed on the minority voters. The district court's construction of the Act defeats the congressional purpose of assuring that the opportunity to participate in the electoral process is equally open to all citizens.

We are aware of no case that supports the district court's construction of the Act. Two cases have rejected it. In Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 502 (5th Cir. 1987), the court said:

> In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at-large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference.

In Campos v. City of Baytown, 840 F.2d 1240, 1245 (5th Cir. 1988), the court rejected the argument that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group." We are aware that the factual situations in these cases differs from that in Norfolk, but their underlying premise is applicable: support for some successful candidates by a majority of minority voters in multimember district races does not prove that the successful candidates were the chosen representatives of the minority when a candidate who received much greater minority support was defeated.

"Definitions and legal criteria . . . must accord with law, and will be reviewed as legal questions." *Collins IV*, 816 F.2d at 938. The district court erred in construing the statutory term "representative of their choice." This skewed its analysis on which it relied to decide the case.

V

If the degree of minority electoral success necessary to defeat this voting rights action were the ability to elect a single candidate to the council, this action would border on the frivolous. Since the passage of the Voting Rights Act of 1965 and the elimination of the poll tax, the black community of Norfolk has been able to elect a single councilman. But this case involves the community's inability to elect a second member until after the institution of this action.

The city attaches great significance to the fact that black candidates have won in seven of ten elections from 1968 to 1986. It emphasizes that since 1968, of the 13 black candidates supported by 70% of black voters, 7 (54%) have been elected.

The significance of these statistics is superficial, because they are largely based on the black community's ability to elect a single black member of the council. The statistics ignore the fact that from 1968 until after this action was brought, the black community was unable to elect a second representative to the city council. To use the city's analysis of the statistics to defeat this action simply places a stamp of approval on token representation.

Gingles explains that "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." 478 U.S. at 56. In the context of this case it is necessary to apply *Gingles'* teaching to the black community's attempt to elect a second black councilman.

It is apparent from the record that the white majority normally voted sufficiently as a bloc to defeat the combined strength of strong minority support plus white crossover votes for minority preferred candidates who sought a second seat on the council. In 1970, Roland J. Walton (B), who received 92.4% of the black vote, received only 14% of the white vote. In 1974, Bond (B), who got 73.4% of the black vote, received only 7.6% of the white vote. In 1980, Butts (B), who received 92.9% of the black vote, received only 9.5% of the white vote. In 1982, Butts (B), who received 87.6% of the black vote, received only 11.2% of the white vote.

Although black voters usually tried to elect a second black councilman, this was not always the case. In 1976, for example, no black candidate opposed Jordan (B), an incumbent. He was re-elected with 97.3% of the black vote and 24.3% of the white vote. The candidate whom the black voters preferred for a second representative on the council was R. Braxton Hill, Jr., (W), who received 76.3% of the black vote and only 20.0% of the white vote. His defeat demonstrates that—regardless of the race of the candidate—the black community, prior to the institution of this suit, could not elect a second representative of their choice.

The statistics show that from 1968 until 1984 all of the minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters. This is precisely the situation *Gingles* described as demonstrating "legally significant white bloc voting." 478 U.S. at 56. The statistics also demonstrate that the complainants have satisfied the third requirement for proving a cause of action under the Voting Rights Act when the inhibiting electoral device is at-large voting. They show that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

VI

The city maintains that members of the black community have no cause for complaint because in addition to its success in electing a single black member to the council from 1968 to 1984, in 1984 a second black member was elected.

Gingles, however, cautions against finding a lack of racially polarized voting where the success of a minority candidate can be attributed to special circumstances. The Court said:

> [T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.

478 U.S. at 57. The Court noted that this list of special circumstances is not exclusive. 478 U.S. at 57 n.26.

The complainants assert that the election of a second black councilman, Rev. Foster, in 1984 was caused by special circumstances and so his election does not negate the existence of racially polarized voting. The city maintains that the district court's finding that Rev. Foster's election was not the result of special circumstances is not clearly erroneous.

In Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) *aff'd sub nom* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), the court said:

> [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. . . . [S]uch success might be attributable to political support motivated by different consid-

> erations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.

485 F.2d at 1307.

Zimmer's example illustrates precisely what happened in Norfolk before the election of the second black councilman in 1984 after this action had been filed. For the first time the mayor supported a second black candidate. Moreover, during the pendency of this action, in which the mayor was a defendant, he publicly stated: "After the election, the issue of black representation may become a moot point." Exhibit Vol. I at 1472. In the same election the "west side group" with which the mayor was affiliated endorsed only two candidates when three seats were vacant. One of the city's witnesses, a member of the House of Delegates of the Virginia General Assembly, described this situation as "unique" or "surprising to say the least." App. Vol. II at 845.

When this case was previously before us after remand from the Supreme Court, we directed the district court to ascertain whether the mayor's remark elicited unusual white support for the black candidate. We added that the district court's findings would not be disturbed unless they were clearly erroneous. *See Collins IV*, 816 F.2d at 938. The district court held that there was no unusual white voting pattern in 1984. *See Collins V*, 679 F. Supp. at 577-78.

Review of the record convinces us that the district court's finding is clearly erroneous. *See* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Fed. R. Civ. P. 52(a). The flaw in the district court's finding is readily apparent. It compared elections in which only one representative of the black community was elected with the 1984 election in which a second black councilman was elected. In support of its finding, the district court emphasized that Rev. Foster, the successful black candi-

date for a second black seat on the council, received 26.6% of the white vote in the 1984 election. The court then compared this vote with the results in previous elections—in 1982, 1978, and 1968—in which black candidates received 31.1%, 32.2%, and 28.7% of the white vote to fill a single minority seat on the council. *Gingles*, 679 F. Supp. at 577-78.

The statistics show that until the 1984 election, when the mayor supported a black candidate and suggested that this suit could be mooted, white voters had cast ballots in sufficient numbers to defeat a second black councilman. Never before had white support for a candidate seeking to become the second black member of the council remotely approached 26.6%. Prior to 1984, the greatest white support for a black candidate seeking a second seat on the council occurred in 1970. In that year, Walton (B) received 92.4% of the black vote and 14.0% of the white vote. He was defeated. Rev. Foster's unprecedented receipt of 26.6% of the white vote was 90% higher than the previous high white vote ever cast for a black candidate who sought a second seat on the council.

Unusual white support for Butts (B) also demonstrates that the 1984 election of Rev. Foster was due to the special circumstances arising out of events associated with the pendency of this action. In 1982, Butts received 11.2% of the white vote and in 1980 only 9.5%. Yet in 1984 after the mayor suggested how this action could be mooted and the "west side group" fielded only two candidates, she received 24.2% of the white vote. Her white vote in 1984 increased 116% over her white vote in 1982 and 155% over her white vote in 1980.

The statistics disclose that no black candidate seeking a second seat on the council as the chosen representative of the black community received more than slight white support until the unprecedented circumstances that occurred in 1984 after this action was filed. The figures also

demonstrate that, prior the the special circumstances of 1984, white voters were able to defeat the combined strength of black voters and white crossover votes, denying the black community a second seat on the council.

We therefore conclude that the election of a second black councilman in 1984 was the result of special circumstances and should not be dispositive in determining whether Norfolk's at-large voting for a multimember council dilutes black voting power. *See Gingles*, 478 U.S. at 57, 75-76.

VII

The complainants also assign error to the district court's finding that the council's appointment of Rev. Green in 1977 to fill the vacancy resulting form Jordan's resignation was not a special circumstance. *Collins V*, 679 F. Supp. at 579-80. The city asserts that there is little doubt that had a black not been appointed the complainants would have called foul and used this as evidence of white council members' insensitivity.

If, as it appears from the city's brief, Rev. Green was appointed to forestall black criticism, this would indeed be a special circumstance. *Cf. Zimmer*, 485 F.2d at 1307. In any event, Rev. Green's appointment has little bearing on the black community's ability to elect a second representative to council, except in a subsequent election after this action was filed when he was able to run with the advantage of incumbency.

Gingles mentions incumbency as a special circumstance that may explain minority success. 486 U.S. at 57. In this case, incumbency was a significant factor in black electoral success. No black incumbent was ever defeated. Conversely, with two exceptions, in the eleven elections from 1968 to 1988, inclusive, no black candidate who was not an incumbent was elected. The first exception was in 1968 when Jordan became the first black member of council

since the at-large system was instituted in 1918. The second exception was in 1984 when Rev. Foster was elected after this action was filed and the mayor stated that the election might moot the suit. The re-election of incumbents in 1986 and 1988, coupled with the pendency of this action and the manifest desire to moot it as evidenced by the 1984 election, also demonstrates that recent re-election of black candidates is attributable to special circumstances. These elections do not negate the existence of the white bloc voting that has characterized the at-large elections in Norfolk.

VIII

The complainants also allege that the district court erred in holding that there was no racial discrimination in the slating process in the 1976 and 1980 elections. *Collins V*, 679 F. Supp. at 581-83.

Slating and denial of black access to the slate are mentioned as pertinent factors in the Senate Report, *see supra* note 3. Nevertheless, in the context of this case, whether slating existed in 1976 or 1980 is largely immaterial. Analysis of the election returns show that from 1968 until 1984 no black candidate could get elected to a second seat on the seven-member council and the single black representative was never defeated. The same pattern prevailed in the two years in which slating was charged and in the years in which it was not. White bloc voting, not slating, was the cause of the black community's inability to elect a second councilman in 1976 and 1980.

IX

In sum, the complainants have satisfied the tripartite test set forth in *Gingles*, 478 U.S. at 50-51, for proving a violation of the Voting Rights Act. They have shown 1) that the minority group is sufficiently large and geographically compact to constitute a majority in at least

two single-member districts, 2) that the minority group is politically cohesive, and 3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate for a second seat on the council.

To be sure, after the passage of the Voting Rights Act of 1965, since 1968 the black citizens of Norfolk have attained at least token representation on the city council. But in the absence of special circumstances, they have not been able to elect a second representative of their choice. Even the candidates elected as a result of special circumstances in 1984, 1986, and 1988 do not give representation in proportion to the black population. But the complainants do not seek proportional representation, and the Act does not require it. The Act does, however, protect them from a system of at-large voting that, tested by the principles explained in *Gingles*, 478 U.S. 30, gives them "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this opinion. Upon remand the district court should enjoin at-large elections for city council. The district court should afford the city a reasonable, specified time to prepare a plan that will remedy the vote dilution arising out of the city's at-large electoral system. The city must then submit the plan for clearance under section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c. If the city fails to enact a legal plan, the court should prepare a single district plan for the conduct of future elections. *See generally* Wise v. Lipscomb, 437 U.S. 535 (1978); Cosner v. Dalton, 522 F. Supp. 350, 363-64 (E.D. Va. 1981) (three-judge court).

CHAPMAN, dissenting:

Because I believe the majority has created new rules which too narrowly restrict who may be a "minority-pre-

ferred candidate" also called "representative of their choice," and which define "legally significant white bloc voting" in a manner contrary to the emphatic language of the statute, I dissent.

I

As the majority has noted, in this challenge to an at-large voting system under 42 U.S.C. § 1973, complainants must prove (1) that their minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that their minority group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986). As the majority opinion also recognizes, resolution of this case depends on whether plaintiffs have satisfactorily proven the third prong of this test, legally significant white bloc voting. It is apparent that within the third element are two determinations to be made: first, who can be counted as a "minority-preferred candidate," and, second, the legal meaning of "usually to defeat" such candidates. The first question is addressed in this section; the second will be considered in Section II.

Unfortunately, neither *Gingles* nor the statute resolves the precise question of who can be counted as a "preferred candidate." The most specific formulation of a test on this point has been offered by this court, in *Collins IV*, 816 F.2d 932, 937 (4th Cir. 1987), in which we stated that the support of a successful candidate by a majority of black voters does not necessarily make the candidate "preferred." In fact, a presumption against such a candidate's representativeness is invoked if some losing candidate received significantly more minority votes. *Collins IV*, 816 F.2d at 937. In this case the question is whether two white candidates, Elizabeth Howell, elected to the council in 1974 and 1980, and Claude Staylor, elected to the council in

1974, can be regarded as "preferred candidates" of the minority. As the majority indicates, in 1974, three candidates received over 50 percent of the black vote. They were: Lenious Bond (black, 73.4 percent), Elizabeth Howell[1] (white, 58.2 percent), and Claude Staylor, (white, 56.5 percent). Howell and Staylor were elected, and Bond was defeated. In 1980, of the two candidates who received more than 50 percent of the black vote, Evelyn Butts, black, received 92.9 percent and lost, while Howell received 72.9 percent and won. The majority concludes, reasoning from *Collins IV*, *Gingles* and two Fifth Circuit decisions, that the district court's finding that Howell and Staylor were preferred candidates of the minority is an "error of mixed fact and law."

Although, as the majority recognizes, the legal and factual issues presented are intertwined, the majority result is nonetheless incorrect because it wrongly construes, both legally and factually, the operation of the *Collins IV* presumption against representativeness. First, implicit in the majority discussion is a legal assumption that in each election there can be only one black-preferred candidate. *Collins IV*, however, is to the contrary. We specifically referred to the fact that "each such [voting] situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community." *Collins IV*, 816 F.2d at 937. The effect of this language is not to require a finding of "most preferred," but this is what the majority proposes. The test is whether the elected candidate can be *fairly* considered as a representative of the minority community and not whether such candidate is the "most preferred." Moreover, it is worth noting that neither appellants nor the majority seem to object to counting Howell as a black- preferred candidate in 1978, when she received roughly the same support of the black community as she did

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[1] Mrs. Howell ran ahead of three black candidates in the black community and she received a higher percent of the black votes than white votes.

in 1974 and 1980. The only difference among the elections is that the black candidate, who received the greatest support of the black community in 1978, was elected. In short, *Collins IV* only creates a presumption, not a rule, that only the most black-preferred candidate can be counted as preferred.

Further, there is no case law to support the idea that preferred means "most preferred." In fact, the two Fifth Circuit cases cited by the majority stand, in part, for an opposite principle. In *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), the court stated that "In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate." The pertinent issue in *Gretna* was whether a black candidate should be counted as a preferred candidate when he was the only black running for the council, despite the fact that he received a lower percentage of black votes than two white candidates. The court found that he could be the minority preferred candidate because it was an election for more than one seat and he was the only black candidate. In *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), the Fifth Circuit held that there may not be a black-preferred candidate when only white candidates sought black or Hispanic votes. *Campos* carries little weight because in the 1974 and 1980 Norfolk elections, blacks sought election to six of the seven available council seats.

The majority's citation of *Campos* and *Gretna* suggests, albeit implicitly, an additional reason why the majority has construed the legal effect of the *Collins IV* presumption so decisively against the city. In both *Gretna* and *Campos* the Fifth Circuit adopted a rule that the candidate's race may be taken into account in determining whether he or she is black-preferred. As the court explained in *Gretna*, "We consider [the black candidate] to be an aldermanic candidate sponsored by the minority group because he received a significant portion of the black vote, and because he is black." *Gretna*, 834 F.2d at 503. Despite the ma-

jority's assertion that it does not decide the issue of whether the race of the candidate is relevant, the harsh way in which the presumption is invoked against Staylor and Howell makes it difficult to conclude that their exclusion as black-preferred candidates is not related to their race. Just as with the majority's assumption that there can be only one black-preferred candidate, the problem with considering the race of the candidate is that it appears to contradict the law of this circuit. This court, at least implicitly, rejected considering the race of the candidate in *Collins IV*, 816 F.2d at 937 n.5, when it stated that: "The question is not, however, so simple as how many blacks versus whites were elected. The [district] court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities."

The effect of the majority's modification of the *Collins IV* presumption is plainly revealed in the majority's discussion of the facts that are said to require the presumption to go unrebutted. The majority first cites the rather conclusory statements of plaintiffs' witnesses to the effect that they believed Staylor and Howell were not "representatives" of the black community. Considering the fact that "representatives" is a legal term, such statements should have little weight, particularly when compared with aggregate voting data indicating majority support for such a candidate.

The remainder of the majority's evidence redefines the very meaning of electoral representativeness. It finds that Howell and Staylor are not representative because Howell said she does not have an opinion on school busing, that she believed that the black community might not have special interests, and because Staylor remarked that he does not admire Dr. Martin Luther King, Jr. The disturbing aspect of this kind of evidence is that it has nothing to do with vote dilution. It only suggests the *ideas* of certain candidates, and has nothing to do with whether

black *voters* were denied equal access to the election process. Representativeness in a Voting Rights context concerns access, and it does not create a right to the representation of certain ideologies. It is discomforting that the majority seems to be suggesting what minority voters should believe. A consequence of such a rule would be a litmus test for the political beliefs of minority preferred candidates. The entire discussion assumes that in Norfolk there are "proper" black political attitudes, and therefore under the Voting Rights Act some ideas are worth more than others. Ironically, the majority's position actually debases the votes of those blacks who do not ascribe to the views imputed to their race by the majority. In this context it is worth noting that Evelyn Butts, by the plaintiffs' own contention, a black-preferred candidate in both 1982 and 1984, testified that she supported continuation of an at-large voting system in Norfolk. According to the majority's reasoning, it follows that this black woman, who won 87 percent and 72 percent of the votes of the black community in two elections, might not be a black preferred representative.

While focusing on evidence that would redefine vote dilution representativeness in terms of intellectual persuasion, the majority ignores substantial evidence that both Howell and Staylor were in fact the legitimate representatives of the black community. The fact of Ms. Howell's consistent and substantial black support are overwhelming and uncontradicted. In 1974 and 1980 she was endorsed by the Concerned Citizens of Norfolk (CCN), the city's most powerful black political group. In 1974, she got more votes than three black candidates. In 1980 she ran better in the black community than one of the two black candidates. She received twice as many black votes as the black president of the Norfolk NAACP. In both elections she received twice as much black support as white support, and she was never supported by more than 39 percent of the whites. The majority's ruling, as a result, puts her in

the absurd position of being overwhelmingly elected three times, but neither black-preferred nor white-preferred. Staylor's black support, in the 1974 election, is also thoroughly documented. Staylor, the City's Chief of Police, resigned from a police officer's organization because it refused to admit blacks. He was endorsed by the CCN.[2] In 1974, he defeated three black candidates and seven other white candidates among black voters. He received only about 10 percent more support among white voters than among black voters.

The endorsement by the CCN of these candidates is worth emphasizing. The district court noted that the CCN is the most influential black political group in Norfolk. In 1974, the CCN endorsed Bond, Howell, and Staylor. Three other black candidates were not endorsed by the group. Bond, Howell, and Staylor subsequently received the highest totals of black vote. In 1980, the CCN endorsed Howell and Butts, but did not endorse Banks, the president of the NAACP. Again, the CCN candidates, black and white, outperformed a competing black candidate among black voters. Finally, the majority concludes that an additional reason Staylor and Howell should not be counted as black-preferred is because their vote somehow reflects a forced casting of all ballots, implying that some whites had to get a large number of black votes. This is not supported by the evidence even though these were multiseat elections. In 1974, Norfolk blacks could have cast all four of their ballots for black candidates, but they chose not to. In 1980, Norfolk blacks could have used the first two of their three ballots to support blacks, but again they chose not to. Similarly, the CCN could have endorsed blacks for six of the seven open seats in 1974 and 1980, but it only endorsed two blacks.

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[2] Plaintiff Collins testified that Staylor was one of three candidates of choice among the blacks in 1974.

In sum, the exclusion of Staylor and Howell as black-preferred candidates is unwarranted either under the law or under the evidence.[3] The majority's interpretation of the rebuttable presumption of *Collins IV* assumes that preferred candidate means most preferred and implicitly adopts a rule which considers black candidates more likely to be black-preferred than white candidates. Further, the court, in imposing the presumption, uses an ideological test in order to determine representativeness. This actually dilutes the votes of black citizens, who disagree with the court's version of black politics, while enhancing the position of a political, not racial group. By emphasizing the ideological test the court has improperly neglected election evidence that Howell and Staylor consistently ran ahead of black candidates among black voters and won the support of the CCN. All of this calls into question the majority's view of the law and the facts. I feel the district court properly considered the law and I believe its factual findings under this law were not clearly erroneous. I would consider Staylor and Howell as preferred representatives of the black community.

II

Having decided what candidates can be counted as black-preferred, the question becomes whether the white majority votes sufficiently as a bloc to enable it "usually to defeat such candidates." If Howell and Staylor are considered black-preferred candidates, then the black-community, since 1968, has elected 11 of its 19 preferred candidates. This means that during the same period the black community was represented by one of seven council

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[3] Reverend Green testifying about Staylor's resignation from the all white police officers organization stated: "The black community thought it was a brave statement, and when he ran for council, they voted for him overwhelmingly. He received the largest vote any candidate has ever received for City Council in the history of the election of the members of City Council."

members (14.3 percent) between 1968 and 1974, two of seven council members (28.6 percent) between 1974 and 1984, and three of seven members (42.9 percent) since 1984. Because black-preferred candidates have won 11 of 19 elections and this is "usual success," not usual defeat, and because in Norfolk, a city 30 to 35 percent black, these numbers indicate that blacks have been sufficiently and proportionately represented, I believe the district court was correct in determining that plaintiffs had failed to satisfactorily prove the third prong of the *Gingles* test, the test of legally significant white bloc voting.

Even without the inclusion of Howell and Staylor as black representatives, plaintiffs have failed to show legally significant white bloc voting. It is that part of the majority opinion which addresses this issue that is the most objectionable. It concludes that the test of usual defeat is not a general test, but depends, instead, on blacks' success in achieving a second seat on the Norfolk council. The special quality of a second seat, although never directly explained by the majority, is that it is the seat which would give plaintiffs proportional representation. The majority concludes that this case is not about electing a single candidate to the council, but is about the black community's success in choosing a *second*, that is, proportional representative. The majority does not cite any authority for the proposition that the correct legal test for bloc voting is whether the majority votes sufficiently as a bloc to usually defeat candidates *for a proportional seat*. There is no such authority. The majority has fashioned a new and sweeping rule of proportionality.

Gingles, unfortunately, does not address the question squarely, but states that a court must determine whether the white majority votes sufficiently as a bloc to usually defeat black-preferred candidates. The rule is expressed only as a general test, effecting a flexible measurement of vote dilution in contests of at-large systems. Moreover, the *Gingles* court indicated that there is no violation when

proportionality is achieved. Therefore one might surmise that under *Gingles* proportionality and "usual success" are not the same, but represent the upper and lower boundaries of a Section 2 analysis.

The majority's rule can be distinguished from that stated in *Gingles* because it is not general or flexible. More important, it is incorrect because it directly contradicts the stated intent of Congress in amending § 2. The principal purpose of the 1982 amendment was to eliminate proof of discriminatory purpose as a prerequisite to establishing a § 2 violation. From the beginning, it was recognized that the elimination of the intent requirement would not confer a right of proportional representation on a minority group. 1982 U.S. Code and Cong. Ad. News 179. When enacted, the statute explicitly stated that "the extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered," and provided that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

Although the results test implies that it is necessary, in part, to measure potential violations by candidate success, the denial of a right to proportional representation is also a fundamental, and not an incidental part of the statute. The importance of this limitation was repeated often in the House and Senate discussions on the bill. The Senate Judiciary Committee, which was largely responsible for the form of § 1973(b), made it clear that a denial of equal access was not coequal with the nonexistent right of proportionality. 1982 U.S. Code Cong. and Ad. News 311-320, 363-364, 369. Moreover, not a single senator who voted for the bill argued that a § 2 violation could be shown by a lack of proportional representation. Senator Mitchell stated that the no right to proportionality provision "should dispel any fear about whether this bill will result in proportional representation." Senator Tsongas noted that the

provision should allay any fear that the " 'results test' will have the effect of mandating a system of proportional representation." Senator Dole, one of the principal authors of the bill, indicated that "No minority group has any constitutional or statutory right to have elected any particular number of their group to political office." He added that "Equal access is not to be confused with any assurance that minorities must be elected in proportion to the their population." Senator Kennedy, another major sponsor of the bill, referred to "highly offensive concepts of proportional representation." Senator Warner stated that the provision was "assurance that the proposed changes in § 2 of the Act would not result in court-ordered establishment of systems of proportional representation by race." 128 *Cong. Rec.* 14, 313 (Mitchell); 14,306 (Tsongas); 14, 316-17, 14, 337 (Dole); 14, 133 (Kennedy); 14,334 (Warner). All of these statements are the remarks of persons who supported the bill, and they are conclusive evidence that Congress did not intend that a right of proportional representation be established by a court created test.

Although the majority states that its holding is in harmony with Congress' explicit rejection of proportionality, the nature of the legal test used establishes a right of proportionality. The majority considers the election of one black to the council, even consistently, over a 20 year period, as tokenism. It states that a case to insure the election of one such black "would border on the frivolous." It focuses, instead, on the "black community's inability to elect a second representative." *Gingles* is interpreted to require scrutiny of white bloc voting "for minority preferred candidates who sought a second seat on the council." The most pertinent fact, according to the majority, is that between 1968 and 1984 "all of the [black] minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters." These statements indicate that by analyzing the case in such a manner the majority has fashioned a right of proportion-

ality. There is no other way to construe this language than to conclude that the failure to achieve proportionality and the § 2 violation are one and the same. As such, the decision does not merely creep up to the notion of proportionality, it embraces it.

The effect of such a rule extends far beyond this case. The majority decision guarantees proportionality in every jurisdiction in this circuit, because it concludes that the usual failure of a minority candidate who is running for a proportional seat is illegal vote dilution. Any at-large system, which does not usually produce proportional representation, is now illegal. Such a holding ignores the clear intent of Congress, and fails to offer any meaningful judicial compromise of the tension created by the coexistence in § 2 of the results test and the no right to proportionality provision. Here, all doubt is resolved in favor of proportionality.

A proper test, which takes into account the meaning of the entire statute, would inquire as to whether black-preferred candidates are normally, or usually defeated. Such a rule does not measure a violation by a right of proportionality, which does not exist. By taking into account the historic success or failure of all black candidates, it would also provide a more accurate portrayal of vote dilution. It would recognize that the election of a single black is not unimportant, because in an at-large system the majority always has the strength to elect all of its candidates. Such a rule would also take account of those situations, as in Norfolk, where, because of its size, the black community is likely to seek more than one seat. It would consider that when there are more defeats of black-preferred candidates, the evidence is more compelling that the system is operating to dilute black votes. *See Gingles*, 478 U.S. at 56 (listing the kinds of factors that should be considered in a white bloc voting analysis). The effect of such a rule would be to give real meaning to all of the statutory language and to Congressional intent by accommodating

both the results test and the denial of a right of proportionality.

Under such a test, between 1968 and 1986, 7 of the 13 black-supported candidates were elected to office. Therefore blacks have not normally or usually been defeated. If Howell and Staylor are considered as black-preferred candidates, then such candidates have won 11 of 19 elections during the same period. These successes are enough to defeat plaintiff's claim of "legally significant white bloc voting."

III

Although the most far reaching aspects of the majority's opinion are discussed in Sections I and II, the majority's treatment of several factors as "special circumstances" to explain black success, deserve comment because they indicate a more general problem of the manner in which the majority's treatment of factual issues in this case tends to limit the deference due the district court findings.

The majority discounts the success of Reverend Foster in 1984 by ascribing it to the white Norfolk Mayor's endorsement of Foster, and indicates that the Mayor was motivated by an attempt to moot this lawsuit. As this court held in *Collins IV*, 816 F. 2d at 938, however, "the Mayor's intent, or whether he or other leaders conspired, is not dispositive" of the legal issue of whether the election was a "special circumstance." Instead, "A proper inquiry must examine the result of the Mayor's conduct and statement. If voting patterns show unusual white support for the black candidate in 1984, the legal significance of his success should be diminished." A finding of unusual white support should be disturbed only if clearly erroneous. *Collins IV*, 816 F.2d at 938. The majority holds that the district court committed legal error because it measured the white support for Foster in 1984 against white support

for all other black candidates, and not just against black candidates contending for the "second seat."

First, this analysis is incorrect on the ground, already stated, that it establishes a right to proportional representation. Foster's success should be compared against the white vote for all blacks, not just those running for the proportional seat. This evidence indicates that Foster's level of white support was not unusual at all. Green (1978, 1982, 1986) and Jordan (1968) are blacks who received greater white support than Foster. Moreover, Foster's success was statistically insignificant when compared to the performance of black-preferred candidates in four other elections. Foster's white support was either less than or equal to white support for other black candidates in eight of thirteen elections. The district court's finding that there was no "special circumstance" in Foster's election is not clearly erroneous.

More seriously, the majority's conclusion is incorrect even on its own terms. In the same 1984 election, Evelyn Butts, a black seeking election to the same "second seat," received 24.2 percent of the black vote. This total is statistically insignificant from Foster's 26.6 percent figure. The majority's effort to explain this by stating that unusual support for Butts was also evidence of unusual white support for Foster, the elected candidate, is unfathomable. First, the Mayor and his supporters' acted for Foster, not Butts. Their action in behalf of Foster is the sole basis for this special circumstance inquiry. Thus, the question is whether the mayor's support produced unusual support for Foster, not Butts. The implication of Butts' relative success among white voters is plainly that the Mayor's actions *failed* to produce unusual support for Foster because Butts performed just as well among whites as Foster. White votes for Butts did not help Foster to get elected, so this did not produce a so-called "special circumstance." Under any test, the district court was not clearly erroneous in finding Foster's election was not the

result of "special circumstance." Indeed, the nature of the dispute over what the evidence reveals emphasizes why fact finding is entrusted to the trial judge.

Second, the majority holds that the district court's finding that incumbency was not a special circumstance was clearly erroneous. The majority's test seems to be that the electoral success of incumbents and the defeat of nonincumbents indicates that incumbency rises to the level of a special circumstance. Such a rule would make practically every American election a "special circumstance." For "special circumstance" to have any meaning one must produce specific evidence that incumbency, in the case of individual candidates, produced real benefits. The evidence here is that it did not. The majority points out that "with two exceptions" "no black candidate who was not an incumbent was elected." The problem with this conclusion is that between 1968 and 1988 there were only six black-preferred candidates, who ran as unelected non-incumbents, and two of them were elected. The majority seems to reason if perhaps four, five, or all six non-incumbents were elected, then incumbency could not be considered a special circumstance. Given the nature of the election process, the expectation is unreasonable, particularly because the pertinent question is whether non-incumbency itself is an unusual handicap in Norfolk. The majority also states that no incumbent black has ever lost a reelection campaign. The test, however, is not merely who wins and loses, but whether incumbency helps to explain such wins and losses. The statistics indicate that the two blacks who were reelected as incumbents, Jordan and Green, did not benefit from incumbency. For example, Jordan's white support declined in both 1972 and 1976 from his first election in 1968. He was nonetheless reelected. Similarly, Green's white support declined from 1978 levels in the 1982 and 1986 election. However, he was reelected. Green even lost black support during the same period. Declining support, particularly among whites, is not a measure of the benefits

of incumbency. Instead, it raises a reasonable inference that these men were reelected based on a core constituency developed in their first election, not in the period of incumbency. The district court's finding on this point was not clearly erroneous.

The judgment of the district court was correct, and it should be affirmed. The majority opinion, in several respects, creates new law which I believe conflicts with the law of this circuit, the rule of *Gingles*, and the intent of Congress. For these reasons and the reasons stated above, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CASE NUMBER: CA-83-526-N

HERBERT M. COLLINS, ET AL

v.

CITY OF NORFOLK, ET AL

FILED

FEB 3 1988

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court therefore finds that Norfolk's at-large system for the election of City Council members does not violate Section 2 of the Voting Rights Act, and judgment shall enter for the defendants.

February 3, 1988 — Date

DORIS R. CASEY — Clerk

/s/ Bonnie L. Day
Deputy Clerk Bonnie L. Day

A TRUE COPY, TESTE:
Doris R. Casey, Clerk

By /s/ Bonnie L. Day
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 83-526-N

HERBERT M. COLLINS, et al.,

Plaintiffs,

v.

CITY OF NORFOLK, et al.,

Defendants.

FILED

FEB 3 1988

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

ORDER

This case is before the Court on remand from the Fourth Circuit Court of Appeals. Plaintiffs, Herbert M. Collins; Dr. H. Marks S. Richard; Barbara C. Parham; William E. Swindell, Jr.; Dr. Milton A. Reid; George Banks; Julian Hazel; and the Norfolk Branch of the National Association for the Advancement of Colored People (NAACP) sued defendants, the City of Norfolk, Virginia; the Norfolk City Council; City Council members Vincent J. Thomas, Joseph A. Leafe, Dr. Mason C. Andrews, the Reverend Joseph N. Green, Jr., Claude J. Staylor, Jr., Robert E. Summers and Elizabeth M. Howell; the City of Norfolk Electoral Board; and Electoral Board members Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, alleging that Norfolk's at-large system of electing City Council members improperly diluted black voting strength in violation of the Four-

teenth and Fifteenth Amendments to the United States Constitution, Amended Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and 42 U.S.C. § 1983.

I. Statement of the Case

The following facts were found by this Court at the original trial and were not disputed on appeal. Plaintiffs, except for the Norfolk NAACP, are black registered voters of the City of Norfolk. Plaintiffs Collins, Reid and Banks, and plaintiffs' attorney James F. Gay are unsuccessful candidates for election to the Norfolk City Council; Collins and Gay were endorsed in their unsuccessful campaigns by plaintiff Dr. Milton Reid, publisher of the newspaper, *The Journal and Guide*. They were not, however, endorsed by the Concerned Citizens of Norfolk (CCN), the then dominant black political organization in Norfolk. Plaintiff Swindell is an unsuccessful candidate for the House of Delegates from Norfolk. Plaintiffs Collins, Richard, Parham and plaintiffs' attorney Gay are former Norfolk City Democratic Committee members who were removed from their positions shortly before filing the instant action.

This Court entered judgment for the defendants, *Collins* v. *City of Norfolk*, 605 F. Supp. 377 (E.D. Va. 1984), holding that plaintiffs had failed to prove their claims under the Fourteenth and Fifteenth Amendments and Section 1983, and further holding that plaintiffs had failed to establish their vote dilution claim under the Voting Rights Act, Section 2 as amended, 42 U.S.C. § 1973.

The Fourth Circuit affirmed. *Collins* v. *City of Norfolk*, 768 F.2d 572 (4th Cir. 1985). Plaintiffs petitioned the United States Supreme Court for a Writ of Certiorari. One week after its decision in *Thornburg* v. *Gingles*, 106 S. Ct. 2752 (1986), the Supreme Court, without considering the merits of the case, remanded *Collins* to the Fourth Circuit "for further consideration in light of *Thornburg* v. *Gingles*." *Collins* v. *City of Norfolk*, 106 S. Ct. 3326 (1986). The Fourth Circuit remanded the case to this Court for

reconsideration of the issues of racial polarization, minority electoral success, candidate slating, and government responsiveness in the East Ghent redevelopment. *Collins* v. *City of Norfolk*, 816 F.2d 932 (4th Cir. 1987).

Plaintiffs did not appeal the disposition of their constitutional and Section 1983 claims, and these matters are therefore no longer before this Court. Plaintiffs now seek a declaratory judgment that the at-large system of electing Norfolk's City Council members unlawfully dilutes black voting strength; an injunction prohibiting the holding of future City Council elections under the at-large system; and the replacement of the at-large system with a system of wards or single-member districts. Except for the issues enumerated here and discussed below, this Court's findings in 605 F. Supp. 377 were unchallenged or were affirmed on appeal, and are therefore the settled law of the case.

A. Issues to be Determined on Remand

On remand, this Court must reconsider the following factors in light of *Thornburg* v. *Gingles*:

1. Whether analysis of the voting patterns of black and white voters over a period of years reveals legally significant racially polarized voting in the Norfolk City Council elections. 816 F.2d at 936 and 936 n. 3.

2. Whether black electoral success in Norfolk has been so consistent (and nearly proportional) as to overshadow any racially polarized voting and other factors tending to dilute minority access. 816 F.2d at 937.

3. Whether the success of a second black candidate in 1984, after the filing of this lawsuit, resulted from unusual circumstances, such as an attempt by white officials to forestall Voting Rights Act litigation. 816 F.2d at 938.

4. Whether any group of white citizens involved in the Norfolk City Council elections acted as a formal or informal slating organization, controlling access to the ballot,

and adversely affecting black citizens' access to the electoral process. 816 F.2d at 939.

5. Whether the removal of mostly black, low-income families from the East Ghent area of Norfolk was unresponsive to the needs of the minority community. 816 F.2d at 939.

B. Settled Factual and Legal Issues

The following findings of this Court were not designated for consideration on remand, are now the law of the case, and will not be reconsidered here:

1. Despite past acts of official discrimination, Norfolk's black citizens today participate in the electoral process equally with white citizens, and have higher registration and turnout rates than do whites. The procedures and facilities of the Registrar's Office are fair and are equally accessible to all of Norfolk's citizens. 605 F. Supp. at 385.

2. Norfolk has no unusually large election districts, majority vote requirements, anti-single shot provisions or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group. 605 F. Supp. at 389-90.

3. Norfolk's black citizens are not hindered in their participation in the electoral process by socio-economic disparities in such areas as education, employment and health. 605 F. Supp. at 392.

4. Norfolk's political campaigns have not been characterized by either subtle or overt racial appeals. 605 F. Supp. at 393.

5. The at-large system in effect in Norfolk and in a large majority of other cities in Virginia is not the result of a tenuous state or local policy. 605 F. Supp. at 399.

Both plaintiffs and defendants having submitted briefs and memoranda, and oral argument having been heard on the matter, this case is now ready for determination.

For the reasons set forth below, the Court finds that the voting patterns in Norfolk do not reflect legally significant racially polarized bloc voting within the *Gingles* standard; that Norfolk's black voters have usually been able to elect their preferred candidates; that black electoral success in Norfolk has been so consistent and nearly proportional as to preclude a finding of vote dilution under Section 2 of the Voting Rights Act and to overshadow any racially polarized voting and other factors, if those factors had been found; that the success in 1984 of a second black candidate after the filing of this lawsuit did not result from unusual circumstances or from any action or inaction by white officials or political leaders tending to forestall Voting Rights Act litigation; that no group of white citizens involved in the Norfolk City Council elections acted as a formal or informal slating organization; that no such group controlled access to the ballot or adversely affected black citizens' access to the electoral process; and that the East Ghent relocation process was not unresponsive to the needs of the minority community. This Court therefore finds for the defendants on all grounds. All facts found in 605 F. Supp. 3771 and not disturbed on appeal are considered as established facts in this opinion.

II. Discussion of Issues on Remand

Much of the evidence overlaps between issues in this case. For the sake of clarity, the Court will not follow the sequence of issues on remand, but will arrange its discussion of issues by topic.

A. The 1982 Amendments to Section 2 Of The Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, prohibits any voting practice or procedure "imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."

A violation of this Section "is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See Thornburg* v. *Gingles*, 106 S. Ct. at 2759.

B. The Senate Report Factors

The Senate Report, S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in 1982 U.S. Code Cong. & Ad. News* 177, 179 [the Senate Report] which accompanied the bill amending Section 2, "espouses a flexible, fact-intensive test for § 2 violations." *Gingles*, 106 S. Ct. at 2764. At-large voting is not a *per se* violation of the Act, and the Act explicitly denies that any group is entitled to proportional representation. While the Senate Report provides that "[t]he extent to which members of a protected class have been elected to office" is one circumstance to be considered, the Report also provides specifically "[t]hat nothing in this Section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 106 S. Ct. at 2759-60.

Proof of discriminatory intent is not required to establish a violation of Section 2. Rather than provide a hard and fast test, the Senate Report enumerates the following "typical factors," derived from *White* v. *Regester*, 412 U.S. 755 (1973) and from the Fifth Circuit's opinion in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam):

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 106 S. Ct. at 2759-60 and 2759 n. 4 (quoting S. Rep. at 28-29). A court must assess the impact of a contested structure or practice "on the basis of objective factors," such as the Senate Report factors. *Id.* at 2759-60 (citing S. Rep. at 27). However, it is not necessary that a certain number (or even a majority) of factors point one way or another. S. Rep. at 29.

C. Gingles v. Edmisten and Thornburg v. Gingles

Gingles v. *Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) *rev'd in part and aff'd in part sub nom Thornburg* v. *Gingles*, 106 S. Ct. 2752 (1986), establishes the standard for interpreting Section 2 and the Senate Report factors. In *Gingles*, black North Carolina voters sued various North Carolina officials, claiming that North Carolina's legislative districting scheme resulted in impermissible vote dilution and violated their rights under the Fourteenth Amendment to the United States Constitution, and under Amended Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Specifically, the *Gingles* plaintiffs alleged that the plan submerged black voting minorities in multi-member House Districts 36, 39, 23, 21 and 8; and multi-member Senate District 22. They further alleged that the plan fractured a geographical concentration of blacks between more than one Senate District, including Senate District 2, so that there was no effective voting majority of black citizens in any one district. 590 F. Supp. at 349-50.

The *Gingles* three-judge district court relied on the Senate Report factors in determining the statutory claims, applying the "totality of the circumstances" test set forth in Section 2(b). It found that the North Carolina redistricting plan violated Section 2 by diluting the black citizens' vote in all seven of the challenged districts. 590 F. Supp. at 376. *See also* 106 S. Ct. at 2760. The Supreme Court affirmed as to six of the districts, but a plurality of six Justices writing in three opinions reversed as to House District 23. Although the district court had found

violations of all but one of the Senate Report factors in that District, persistent black electoral success in District 23 precluded the plaintiffs from prevailing in that district. The plurality establishes that proportional representation bars a Section 2 claim. However, nothing in *Gingles* creates an entitlement to proportional representation, or establishes less-than-proportional representation as proof of a violation.

A comparison of the application of the Senate Report factors in *Gingles* and in *Collins* will therefore be instructive.

1. Lingering Effects of Past Official Discrimination and Discriminatory Voting Practices

The *Gingles* district court found a long history of official discrimination in North Carolina's State Senate and House elections, with poll taxes, numbered-seat plans and anti-single shot provisions in effect into the late 1960's. As late as 1970, a literacy test requiring black voters to read and write the Constitution was in effect in some North Carolina districts. 590 F. Supp. at 359-60. Since 1915, North Carolina had had a majority vote requirement for primaries, making it less likely that minority-preferred candidates could finally win elections. 590 F. Supp. at 363. As a result of this official discrimination, the district court found that, at the time of trial, "black voter registration remains depressed relative to that of the white majority," *id.* at 361, and that lingering effects of discrimination in facilities, education, employment, housing and health care continued to hinder North Carolina's black voters in their ability to participate effectively in the political process. *Id.* The court also found that the percentage of black registered voters in North Carolina was far below the percentage of blacks in the population. *Id.* at 357.

In Norfolk, by contrast, there is no majority vote requirement. Black voters exceed white voters in registration and turnout rates. 605 F. Supp. at 385. Despite an early

history of discrimination against blacks in Virginia, there are no lingering effects of discrimination in facilities, education, employment and health care affecting their ability to participate in the electoral process. *Id.* at 392. Norfolk's black citizens today participate in the electoral process equally with white citizens, and the procedures and facilities of the Registrar's Office are fair and equally accessible to all of Norfolk's citizens. *Id.* at 385. Norfolk has had no discriminatory voting practices at any time relevant to this litigation. *Id.* at 389-90.

2. Overt or Subtle Racial Appeals

Appeals to racial prejudice were prevalent in North Carolina's elections at the time of trial, and had been widespread and persistent for the past thirty years. 590 F. Supp. at 364. Some racial appeals by candidates and supporters were overt and blatant, while others were more subtle and furtive. *Id.* However, the specific examples of racial appeals in the North Carolina elections "reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices on the part of white citizens in regard to black citizens and to black citizens' participation in the political processes of the state." *Id.*

No such racial appeals were present in the Norfolk City elections. 605 F. Supp. at 392-93.

3. Whether the State's Policy is Tenuous

The Supreme Court found the policy behind the North Carolina plan to be tenuous. The policy behind Norfolk's at-large election system is not tenuous.

The *Gingles* redistricting plan, unlike the Norfolk at-large election plan, was put into place after the Voting Rights Act was passed. 590 F. Supp. at 350. The policy behind the original North Carolina plan was that no county should be divided, in accordance with the North Carolina Constitution. However, the revised redistricting plan at

issue in *Gingles* divided some counties. *Id.* at 351. In that case, where North Carolina had already abandoned the "no-division-of-counties" policy for some of the districts, any policy against dividing the remaining counties was clearly tenuous. "[S]uch a policy obviously could not be drawn upon to justify, under a fairness test, districting which results in racial vote dilution." *Id.* at 373-74. Norfolk's policy, on the other hand, "is consistent with both national and state practices for cities with the council-manager form of government" and is not the product of a tenuous policy. 605 F. Supp. at 399.

4. Legally Significant Racially Polarized Voting Under the Gingles Standard

Although all of the Senate Report factors are important, the *Gingles* district court identified as the "linchpin of vote dilution by districting" a pattern of racial bloc voting consisting of

> [t]he demonstrable unwillingness of substantial numbers of racial majority to vote for any minority race candidate or any candidate identified with minority race interests.

590 F. Supp. at 355 (citations omitted). The mere existence of an at-large plan, and the mere fact that blacks are a minority in a given multi-member district does not establish that vote dilution has resulted from the districting plan. *Id.* Nor is a showing that blacks are a voting or population minority in a multi-member district, nor a showing that "blacks have not been elected . . . in numbers proportional to their population" sufficient to establish a violation. *Id.*

While all of the Senate Report factors "may be relevant to a claim of vote dilution through submergence in multi-member districts, *unless there is a conjunction of the following circumstances*, the use of multi-member districts generally *will not impede the ability of minority voters to*

elect representatives of their choice." 106 S. Ct. at 2765-66 (emphasis added) (footnote omitted).

The *sine qua non* of a plaintiff's Section 2 vote dilution claim, as set forth in *Gingles*, is that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 2766 (emphasis in original) (citations omitted). It is "the usual predictability of the majority's success [that] distinguishes structural dilution from the mere loss of an occasional election." *Id.* at 2767 (citations omitted). In making this determination, courts are not to consider whether significant elements in the racial minority disagree with the plaintiffs' requested judicial remedy of single-member districts in which the racial minority constitutes a majority; whether creating "safe" black majority districts would perpetuate racial ghettos and racial polarization; or whether the remedy creates the risk of disrupting the normal processes of acquiring political power. 590 F. Supp. at 356-57 and 356-57 nn. 17-20, and authorities cited therein.

a. Threshold Considerations in Polarized Voting Claims

The theoretical basis for a Section 2 claim is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of the minority voters, and will minimize or cancel out the minority voters' ability to elect their preferred candidates. 106 S. Ct. at 2765.

"First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 2766 (footnote omitted).

"Second, the minority group must be able to show that it is politically cohesive." *Id.* at 2767.

"Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." It is "[i]n establishing this last circumstance, [that] the minority group demonstrates that submergence in a white multi-member district impedes its ability to elect its chosen representatives." It is the "usual predictability" of the majority's success that distinguishes vote dilution from the mere loss of an occasional election. *Id.*

In considering these circumstances under the *Gingles* standard, the Fourth Circuit noted that this Court should not consider causative factors such as backlash and field limitation in determining whether there is racially polarized voting. Rather, this Court

> should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates—if so there is the requisite minority political cohesiveness—and to see *whether the majority vote is sufficiently homogeneous to cancel the minority vote plus the cross-over vote.* These inquiries together determine whether there is a "pattern of racial bloc voting that extends over a period of time," a critical factor in a claim of vote dilution under § 2.

816 F.2d at 935-36 (emphasis added).

As to the first consideration, the Court finds that Norfolk's black population is sufficiently large and geographically compact to constitute an effective voting majority of 65 percent in no more than two of the proposed wards. *See* 590 F. Supp. at 358 n. 21; *see also* Tr. 1661, 1702 (Testimony of William P. Robinson, Jr.).

While the Court recognizes that, in Norfolk, black voter registration and participation is far greater than in *Gin-*

gles, it is noteworthy that in *Gingles*, defendants' expert witness testified that a 65 percent black majority was necessary to create a "safe" black district, and that the Justice Department uses 65 percent as a benchmark for their administration of the Voting Rights Act. It is doubtful that establishing a ward system would produce a greater black presence on Norfolk's City Council than is already there.

Plaintiffs' Exhibit 52 sets forth plaintiffs' proposals for ward boundaries designed to give blacks three safe seats. The proposal sets 32,614 as the ideal population per ward. This excludes, however, the military population of 38,680—a larger segment of the population than that contained in any proposed ward. Additionally, none of the proposals provides for a 65 percent or better black population in as many as three wards. It is highly doubtful that a plan excluding military personnel, who are included in census figures, would pass constitutional muster. *See Reynolds* v. *Sims*, 377 U.S. 533, 563-68 (1964). If the military were included, none of the five proposals would have any validity.

As to the second consideration, the Court finds that the record is clear that Norfolk's blacks are politically cohesive. *See* Def. Ex. 470 (A-I) and 1986 Stip.

However, the Court finds, for reasons stated below, that Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate. The third element is therefore lacking.

b. White Bloc Voting: The Test for Legal Significance

The Supreme Court in *Gingles* did not set forth a "lucid explication of all features of the amended § 2," 816 F.2d at 935, nor did it establish a simple, doctrinal test for legally significant bloc voting. It did make clear that a mere preference for different candidates among voters of different races is not legally significant.

The *Gingles* district court found, based on statistical evidence presented by qualified experts, that blacks and whites generally preferred different candidates, and that the correlation between the voters' race and choice of candidates was "substantively" significant. 590 F. Supp. at 368. *See also* 106 S. Ct. at 2768. Under the Supreme Court's *Gingles* rule this establishes racially polarized voting, and is sufficient to show the cohesiveness of the black minority.

However, after a careful reading of the Supreme Court's *Gingles* opinion and the Fourth Circuit's opinion on remand, it is clear that polarized voting is not legally significant *unless the white bloc voting usually defeats minority-preferred candidates* despite the combined votes of blacks and white "cross-over" votes. The Supreme Court found that while the *Gingles* district court did not use the phrase "legally significant," the record was sufficient to show that the polarized voting in North Carolina met the *Gingles* test for legal significance. 106 S. Ct. at 2771 and 2771 n. 27.

The evidence relied on in *Gingles* included statistical studies of 53 elections between 1978 and 1982 in which black candidates ran. The *Gingles* district court found that in no North Carolina election, primary or general, did a black candidate receive a majority of white votes cast, and that an average of 81.7 percent of white voters did not cast any votes for any black candidates. White voters in the general elections consistently ranked black candidates last or next-to-last, except in heavily Democratic areas. There, white voters still rated blacks last or next-to-last among Democrats, if not last or next-to-last among all candidates. Furthermore, the district court found that in North Carolina approximately 66 percent of all white (Democratic) voters would not vote for a black Democrat even after the candidate had won the Democratic primary and the only alternatives were to vote for a Republican or no one. 590 F. Supp. at 368. (*Gingles* does not indicate

that there were any black-preferred candidates who were not black.)

Only "some" black incumbents were re-elected, and the black incumbents did not receive white majority support even when the election was uncontested. *Id.* at 368-69. The *Gingles* court noted that black participation in North Carolina's political process had recently increased markedly, but that

> [t]he participatory level of black citizens is still minimal in relation to the overall black population, and . . . is largely confined to the relatively few forerunners who have achieved professional status or otherwise emerged from the generally depressed socio-economic status which . . . remains the present lot of the great bulk of black citizens.

Id. at 372.

Similarly, in *City of Petersburg, Virginia* v. *United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), the United States District Court for the District of Columbia analyzed black and white voting patterns in Petersburg's at-large elections, to determine whether annexation of a predominately white area would impermissibly dilute black votes.

In *Petersburg*, the City sought a declaratory judgment under Section 5 of the Voting Rights Act to determine the validity of the proposed annexation, which would have increased the white population by almost 50 percent, and would have eliminated Petersburg's black population majority. The district court found that Petersburg had experienced a "dramatic polarization of the races," and also found "almost total bloc voting by race" in the Petersburg elections. *Id.* at 1025. In the all-white precincts, no more than 8.5 percent of the total vote was ever cast for black candidates in a given election, while in the black precincts

the combined total of all votes cast for white candidates never exceeded 19 percent. In contrast, white vote for white candidates never fell below 91 percent or black vote for black candidates below 81 percent. *Id.* at 1026 n. 10. Two black candidates had won separate elections while whites held a voting majority, but

> [w]hen there was a possibility that by re-electing [a black incumbent] and electing another black candidate, the black members would control the council, there was an unusually large turnout of white voters in the white wards, as a result of which [the black incumbent] was defeated and the second black candidate also lost.

Id. at 1026 (footnote omitted).

Similarly, in *City of Rome* v. *United States*, 472 F. Supp. 221 (D.D.C. 1979) (three judge court), *aff'd*, 446 U.S. 156 (1980), a black candidate defeated three whites in the primary but was defeated in the general election when whites, turning out in unusually high numbers, apparently "coalesced to defeat [the black candidate]" whose election appeared imminent. 472 F. Supp. at 227. The Supreme Court found that the black candidate's defeat in these circumstances was indicative of racial bloc voting. 446 U.S. at 184 n. 20. *See also Butts* v. *City of New York*, 614 F. Supp. 1527, 1545-46 (S.D.N.Y. 1985) (in the one election year where a minority candidate appeared on the run-off slate, he lost overwhelmingly to a white candidate in an election unusual for its high voter turnout).

The situation in Norfolk is quite different. In Norfolk, as discussed below, the white cross-over vote has combined with the black vote to elect the black-preferred candidates most of the time. Norfolk does not have the extreme and entrenched pattern of bloc voting found in *Petersburg*, *Gingles* and the other cases cited above.

It is undisputed that the Norfolk City Council elections are nonpartisan, at-large elections under a simple plurality

vote system, in which all candidates compete for open seats. The four-year terms for the seven-member council are staggered, so that every two years either three or four seats (and in one case, six) are available. Fields of candidates have ranged from eight to twenty-one, with an average of thirteen. These large fields tend to fragment whatever white bloc voting might occur, and work to the advantage of black voters, who tend to concentrate their votes. *See* Tr. 1968 (Testimony of Dr. O'Rourke); Def. Ex. 470 (A-I); 1986 Stip.

White cross-over voting for a black candidate has been above 20 percent in 70 percent of the Norfolk elections. In half of the elections, including the three most recent, white cross-over voting for a black candidate has exceeded 25 percent. Def. Ex. 474-A; 1986 Stip. White cross-over support in elections from 1968 through 1986 has averaged almost 25 percent for the 19 black-preferred candidates (that is, those candidates who received over 50 percent of the black vote in a given election). This is more of the white vote than over half of the white candidates have received. Def. Ex. 470; 474-A; 1986 Stip.

This 25 percent white cross-over vote is even more impressive when considered in light of the relative numbers of blacks and whites in the population. For example, a black candidate, such as Reverend Green, who received 92 percent of the black vote in 1978, received approximately 11,000 black votes. His actual 26 percent white cross-over vote means that approximately 5,600 to 5,700 white voters joined with the 11,000 blacks to ensure the success of the black-preferred candidate. *See* Def. Ex. 470 (A-I); 1986 Stip. Thus, he received approximately one-third of his total vote from white voters.

In Norfolk, black registration and turnout percentages have remained at or above the level for whites since 1980. 816 F.2d at 939; 768 F.2d at 574-75; 605 F. Supp. at 385, 402, 404. In *Gingles*, white cross-over vote was virtually

nonexistent, and even those black-preferred candidates who received the most white cross-over votes usually lost. In Norfolk, those candidates have usually won, as will be more fully discussed below.

The Court finds, based on the evidence presented, that in Norfolk's City Council elections, black-preferred candidates usually win, and that white bloc voting does not usually defeat the black voters' preferred candidates. Plaintiffs have failed to show that the at-large system "operates to minimize or cancel out" their ability to elect their preferred candidates. 106 S. Ct. at 2765 (citations omitted). They have therefore failed to meet the threshold test of Section 2, the establishment of legally significant, racially polarized bloc voting. Plaintiffs' Section 2 claim must fail.

5. Black Electoral Success Under The Gingles Standard

Although the election of a few minority candidates does not necessarily foreclose a vote dilution claim, the extent to which members of a protected class have been elected to office is one circumstance which may be considered. 106 S. Ct. at 2779 (citations omitted). This Court's duty is to conduct an independent consideration of the record and to make "a searching, practical evaluation of the past and present reality in determining whether [Norfolk's] political processes are equally open to all voters." *Id.* (citations omitted).

The Supreme Court in *Gingles* adopted what is in essence a new defense to a Section 2 claim: that roughly proportional minority electoral success will defeat a Section 2 claim even if such factors as racially polarized voting are present. Accordingly, the Fourth Circuit asked this Court to determine

> [w]hether, as a factual matter, black electoral success in Norfolk has been so consistent and nearly

> proportional as to overshadow any racially polarized voting and other factors tending to dilute minority political access.

816 F.2d at 937.

In making this determination, a comparison of black electoral success in the challenged North Carolina districts with black electoral success in Norfolk will be helpful.

a. Black Electoral Success in North Carolina and Norfolk

The *Gingles* court found a significant disparity between the electoral successes of blacks and of whites. At the time of trial (in 1984), North Carolina's black citizens constituted 22.4 percent of the State's total population, but held only 9 percent of the city council seats; 7.3 percent of county commission seats; 4 percent of sheriff's offices; and 1 percent of the offices of the Clerk of the Superior Court. There were 19 black mayors, 13 of whom were from majority black communities. Approximately 40 percent of the 9 percent of city council members who were black were from majority black municipalities or districts. Thus, in *Gingles*, only 5.4 percent of all city council members were blacks elected in areas where whites outnumbered blacks, although blacks made up 22.4 percent of the population. 590 F. Supp. at 365. In contrast, Norfolk's City Council is at present, and has been since the 1984 election, 28.5 percent black. This figure is far more nearly proportional to Norfolk's 35.2 percent black population than the 5.4 percent figure is to North Carolina's 22.4 percent black population. *See* 605 F. Supp. at 382.

Between 1971 and 1982, black representation in North Carolina's legislature ranged between 1.6 percent and 3.3 percent of the House seats, and 2 percent and 4 percent of the Senate seats, although the electorate was 22.4 percent black. 590 F. Supp. at 365. By contrast, from 1970 to 1982, Norfolk's City Council ranged from 14.3 to 28.6

percent black. More importantly, black voters in Norfolk between 1968 and 1986 elected their first or second choice 100 percent of the time, in fields of as many as 21 candidates. *See* Def. Ex. 470 (A-I); 1986 Stip. From 1970 to the present, Norfolk's City Council has included at least two, and sometimes three, members who were endorsed by black civic groups and who received majority black support. 605 F. Supp. at 400. All black incumbents who have run have been re-elected, a success rate of 100 percent, while the white incumbents' success rate has been only 80 percent. *See* Def. Ex. 470 (A-I); 1986 Stip.

In North Carolina, black-preferred candidates who won Democratic primaries in the challenged districts were three times as likely to *lose* the general election as were their white counterparts. 590 F. Supp. at 365. No blacks had ever been elected to the State Senate from the area encompassed by House Districts 2, 8, 23 and 39. *Id.* at 366. Only one black had been elected in this century to the State Senate in Senate District 22, and from the area encompassed by House District 21, although in the latter case the Senator was elected for two terms. *Id.* at 365-66. Through 1983 there were only one or two blacks at any time in the 50-member State Senate, a mere 2 percent to 4 percent, although blacks then constituted about 22 percent of the total North Carolina population. *Id.* at 365. In the area encompassed by Senate District 22, there had been a total of nine other black candidates, seven for the House, and two for the Senate, all of whom been defeated. *Id.*

In Norfolk, considering *all* candidates (and not just those who received majority support), 30.43 percent of all black candidates who have run for City Council since 1968 have won, compared with 29.24 percent of all white candidates. *See* Def. Ex. 470 (A-I); 1986 Stip.

North Carolina's black candidates for the State House of Representatives fared only slightly better than candi-

dates for the State Senate. From 1971 through 1982 there were never more than two to four blacks in the 120-member House of Representatives (a mere 1.6 to 3.3 percent of the House members). 590 F. Supp. at 365. No black Representative had ever been elected from House District 8, *id.* at 366, and only one from House District 36. *Id.* at 365. In House District 39, only one black Representative had ever been elected before the *Gingles* lawsuit. Two were elected after the suit was filed. *Id.* at 366. The court indicated that their election may have resulted from "unusual organized political support by white leaders concerned to forestall single-member districting . . . ." *Id.* at 367 n. 27. In House District 21, a black Representative was twice elected to the State House, and was serving at the time of trial. *Id.* at 366.

In House District 23 (Durham), however, one black citizen had been elected every two years since 1973 to the State House, and 25 percent (3 of 12) of the Durham City Council members were black. Durham is 47 percent black. *Id.* at 366. A plurality of the Supreme Court held that this steady pattern of success foreclosed plaintiffs' claims of vote dilution, notwithstanding that the black representation in Durham was not mathematically proportional. 106 S. Ct. at 2780 (Brennan, J.); 106 S. Ct. at 2783 (White, J.); 106 S. Ct. at 2793 (O'Connor, J.).

Apart from District 23, however, blacks did not fare well in city council elections in the challenged North Carolina districts. Black voters in Charlotte (House District 36; Senate District 32), for example, were 31 percent of the total population, yet were only 5.4 percent of the Charlotte City Council's at-large elected members before 1975. From 1977 to 1981, blacks won 28.6 percent of the district seats and only 16.7 percent of the at-large seats. 590 F. Supp. at 365.

Norfolk's blacks were 28.3 percent of the population until 1980, and approximately 35 percent since then. *See*

605 F. Supp. at 382; Def. Ex. 107 at Table P-1. Black-preferred candidates consistently held 28 percent of the City Council seats from 1968 to 1984, and presently hold 41 percent, all elected at-large. *See* Def. Ex. 470 (A-I); 1986 Stip.

After the *Gingles* trial, a black candidate was elected mayor of Charlotte, receiving approximately 38 percent of the vote. 590 F. Supp. at 366. In the area encompassed by House District 21, there had been a one-term black mayor in the early 1970's, and one black city council member. There was one black on the County School Board, one on the seven-member Board of County Commissioners, and a twice-elected black sheriff. In House District 36 (Senate District 22), one black citizen was elected three times and defeated once for the Board of County Commissioners. 590 F. Supp. at 365-66. Only two blacks had ever been elected to the Board of Education. In House District 39, one black had been elected, then defeated twice, then re-elected to the otherwise all-white, eight-member Board of Education. Another had been elected, then defeated, then re-elected to the Board of County Commissioners. *Id.* at 366.

In House District 8, a similar pattern emerged. There had been only two black members of the Board of County Commissioners in one of the three counties that comprise this district (both elected since 1982), and none in the other two counties. There was only one black Board of Education member, at the time of the *Gingles* trial, in a community that was 36.5 percent black. *Id.* at 366. The City of Wilson, North Carolina, located in House District 8, had one black councilman out of six, in a 40 percent black community. Likewise, in the area encompassed by Senate District 2, all black candidates who had run for the Halifax Board of County Commissioners and for the Roanoke Rapids City Council had lost. *Id.*

Based on the record summarized above, the district court in *Gingles* found that the overall results achieved to date by blacks at all levels of elective office in North Carolina were minimal in relation to the percentage of blacks in the total population. 590 F. Supp. at 367. This is not the case in Norfolk, as the evidence makes abundantly clear.

b. Statistical Models of Racial Voting Patterns

The City of Norfolk does not maintain voter registration or turnout figures by race, nor does the secret ballot permit observation of how a particular voter of a particular race voted. Tr. 721. Therefore, both plaintiffs and defendants used statistical estimates of voting behavior. 605 F. Supp. at 386. The only information from which these estimates can be drawn is the total number of people who register and vote in a precinct, and the total number of votes cast in a precinct for a particular candidate. These numbers are then applied to the precinct's racial composition, based on census data, in order to estimate how many blacks and how many whites voted for specific candidates. Tr. at 883-84.

The two standard statistical methods used to analyze group voting behavior are the "regression analysis" and the "homogeneous precinct", or "extreme case" analysis methods. Both were employed at trial, Tr. 1834-36, 1948, and both were acknowledged by the Supreme Court in *Gingles* as standard techniques for use in voting rights cases. 106 S. Ct. at 2768 n. 20.

The Fourth Circuit indicated that it believed that this Court did not admit plaintiffs' regression analysis into evidence. Plaintiffs' regression analyses were admitted into evidence as Exhibit P-50-b. Tr. 582. Nevertheless, this Court found that plaintiffs' studies contained serious methodological flaws which severely undercut their probative value. *See* 605 F. Supp. at 387. The Court of Appeals for the Fourth Circuit did not challenge this Court's finding of methodological flaws except to the extent that plaintiffs

may have been asked to isolate variables other than race. On remand, the Fourth Circuit only asks this Court to clarify its position on plaintiffs' methodology. *See* 816 F.2d at 936.

During discovery and trial, plaintiffs presented three statistical reports by Mr. Brace and Mr. Peterson, and one by Dr. Engstrom. *See* Def. Ex. 99, 103; Ex. P-50-b. Each employed regression analysis and each yielded different turnout, registration and vote totals for the same elections. For example, in 1978 by a homogeneous precinct analysis black incumbent Joseph Green received 32.2 percent of the white vote. Def. Ex. 470 (D). Plaintiffs' regression analysis yielded a figure of 20.2 percent in the first report, Def. Ex. 99; 18.7 percent in the second report, Def. Ex. 103; and 26.5 percent in the third report. Ex. P-50-b.

Again, using homogeneous analysis, Mason Andrews received 16.7 percent of the black vote in 1974. Def. Ex. 470 (F). Using plaintiffs' regression analysis, however, Andrews' percentage for that same election changed from 17.4 percent in the first report, Def. Ex. 99, to 9.4 percent in the third report. Ex. P-50-b.

The first report listed two black candidates as white candidates, contained errors in nomenclature, did not weight the computations to allow for differences in precinct size and excluded 38,000 mostly white, voting-age Navy residents. Tr. 475, 491-92, 495-96, 547 (Testimony of Carl B. Peterson). *See* Def. Ex. 99. Plaintiffs' second report, produced to replace the first report, repeated the errors in calculations and the errors in the race of two candidates. This report weighted all computations by voting age population, which plaintiffs' expert conceded was an error. The report still excluded 38,000 voting-age Navy residents. Def. Ex. 103; Tr. 495-520 (Testimony of Carl B. Peterson).

Plaintiffs' third report, produced four weeks before trial, weighted the data by precinct turnout, giving greater im-

portance to election results in precincts with higher turnouts. Again, the Navy residents were "put in a hypothetical, nonexistent precinct, to eliminate them." Tr. 475, 543 (Testimony of Carl B. Peterson).

The exclusion of approximately 38,000 predominately white, voting-age Norfolk residents residing on Norfolk's Navy bases or aboard ships home-ported in Norfolk (a full 17 percent of Norfolk's total population and a larger population than that of one of plaintiffs' "ideal" proposed wards), improperly skewed the results of their studies, inflating white registration and turnout figures, 605 F. Supp. at 387, and exaggerating the number of whites not voting for blacks. Tr. 527-28, 1842-43. The Fourth Circuit, in its first opinion, noted the impact of leaving out this large, mostly white population. 768 F.2d at 575 n. 6. These voters are eligible to run for office, are counted in the census figures for Norfolk, are considered by the State legislature in drawing House and Senate districts, and cannot properly be excluded from the voting calculations. Tr. 546, 1833; 605 F. Supp. at 387. This error was compounded in both the second and third reports by plaintiffs' further error of including as "white" the approximately 8,000 to 9,000 Norfolk residents who are neither white nor black. *See* 605 F. Supp. at 387, Tr. 498-99. One candidate's race was still wrong in the third report. Tr. 539.

Another serious flaw in plaintiffs' regression analyses was the use of "double regressions", which led to such impossible results as figures indicating that a candidate received fewer than zero votes, or more than 100 percent of all votes. Tr. 943-48. These impossible results were then "normalized" by the introduction of a "fudge factor". Tr. 551-52, 948. Plaintiffs' expert Dr. Engstrom admitted that he did not understand this "fudging" of figures. Tr. 948.

The fourth report, produced two weeks before trial, relied on data in the earlier reports, repeating the erroneous exclusion of the military, and including as white those

voters who were neither black nor white. Tr. 942. This last report considered only three elections, Tr. 984, and also contained certain methodological weaknesses. Tr. 1845-50.

These methodological flaws are distinct from the issue of causative factors, and go directly to the reliability of the figures derived, and to the reliability of conclusions drawn from those figures. While regression analysis, properly performed, can yield probative results, the Court finds that the methodological weaknesses of plaintiffs' regression analyses have so distorted the resulting participation and vote percentages for the various candidates that plaintiffs' studies, and evidence based on these studies, can have only minimal probative value in this matter.

This Court will, therefore, base its conclusions on the *plaintiffs' and defendants'* homogeneous precinct analyses, which agree as to the black precincts, and are extremely close as to the white precincts, and which do not contain the fundamental flaws the Court finds in plaintiffs' regression analyses. The Court should, however, consider all statistical testimony with caution. See, for example, the testimony of plaintiffs' expert Mr. Brace where he testified that if 100 percent of all white voters cast one of their four votes for a black candidate in a four-seat election, his table would show only a 25 percent white cross-over vote. Tr. 800.

c. Success of Black-Supported Candidates In Norfolk's Elections

The Supreme Court clearly contemplates that a "candidate of choice" of the black community may be of any race, and need not be black, as it consistently refers to the minority's preferred candidate, or candidate of choice, rather than the minority candidate. Four of the Justices would have so held. 106 S. Ct. at 2775 (Brennan, J.). Justice White disagreed that the candidate's race is *per se* irrelevant, and said it was not necessary to decide that

issue. 106 S. Ct. at 2783-84. Justice O'Connor, writing for four Justices, agreed with Justice White that the candidate's race was not always irrelevant, and also agreed that the Court need not decide the issue. 106 S. Ct. at 2793. No Justice said that a black-preferred candidate must be black. Plaintiffs' expert Dr. Engstrom concurred. Tr. 992. The black community's candidate of choice remains the candidate of choice even if he or she received white support, and even if the candidate could not have been elected without that white support. As Justice Brennan wrote for the plurality, "Under §2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important." 106 S. Ct. at 2776 (emphasis in original). This Court must, therefore, ask who are the black community's candidates of choice, and then ask whether white racial bloc voting usually defeats the combined black vote and white cross-over vote for these candidates.

i. Majority Black Support

More than half of all candidates receiving majority black support have been elected in the past eighteen years. Def. Ex. 470 (A-I); 1986 Stip.

With whites in Norfolk comprising two-thirds of the population, they could win every seat if they were in fact voting as a racially polarized bloc. On the contrary, the record indicates that between 1968 and 1986 white-preferred candidates have won only 25 of the 38 seats contested, or 65.79 percent. *See* Def. Ex. 470 (A-I); 1986 Stip. This success rate corresponds almost exactly with the proportion of whites in the population: 66 percent.

The substantial success rate of black-preferred candidates, electing 11 candidates for 38 contested seats (29 percent), is roughly equivalent to the proportion of blacks in the population (28 percent until 1980, and 35 percent after 1980). Def. Ex. 470 (A-I); 1986 Stip. Therefore, both races are electing their preferred candidates in numbers

roughly proportional to their percentages of the population.

More than half of all black-preferred candidates (11 of 19), and 100 percent of black incumbents, have won. In Norfolk City Council elections, whites have voted for black-preferred candidates in numbers sufficient to enable them to be elected. Tr. 1952-53, 1970-71 (Testimony of Timothy J. O'Rourke). In 1986, under homogeneous precinct analysis, black voters elected their first and third choices, while white voters elected their first, second and fourth choices. In 1986, Randy Wright was the white voters' third choice, under homogeneous analysis, with 60 percent of the white vote. (He was the whites' second choice under the 1986 stipulated regression figures, with 70 percent.) He lost the election because of a lack of black support, despite his preferred position among whites. 1986 Stip.

Plaintiffs' argument that candidates most preferred by the black voters were defeated in three of the five elections between 1974 and 1982 does not stand up to closer examination. The basis for their assertion is that their regression analysis, the defects in which are discussed above, purportedly shows that Mrs. Butts, who lost, received 93.1 percent of black-voter support and Reverend Green, who won, was second with 92 percent. However, plaintiffs' expert testified at trial that the election estimate figures were "too close to call." Tr. 917. In other words, the estimates for the two candidates were too nearly identical to afford grounds for plaintiffs' statement. If plaintiffs' own homogeneous analysis figures are used, however, Reverend Green is the first choice of black voters, over Mrs. Butts, which would produce three wins and two losses by black voters' first choice (a 60 percent success rate) for that period. *See* Ex. P-50-b.

Plaintiffs' reliance on Exhibit P-185 (Table 11), which purports to show that between 1974 and 1982 there have been twelve black candidates for Norfolk City Council, of

whom only three were elected, is also misleading. Six of the nine losing candidates, including plaintiffs Reid, Collins, Banks and plaintiffs' counsel Gay, were rejected by the black community, leaving only three candidates who received a majority black vote but lost the election. These three were actually only two individuals: Mr. Bond in 1974, and Mrs. Butts in 1980 and 1982. Tr. 805-09 (Testimony of Kimball W. Brace). Mrs. Butts lost in 1980 by only 405 votes, and still ran ahead of the white incumbent, Conoly Phillips, who was defeated. Tr. 1978.

The black community's first choice candidate has been elected in six of the eight elections since 1972 (the cut-off date used in *Gingles*), establishing a success rate of 75 percent for the candidate of first choice (or 78 percent if the 1968 election is included). If the black community's candidates of first and second choice are considered, the figure rises to a highly satisfactory 100 percent rate of success for first or second choice for the last eight consecutive elections. These results are even more probative of black electoral strength in view of the crowded fields of candidates in each election. *See* Def. Ex. 470 (A-I); 1986 Stip. The elections in Norfolk contrast sharply with the elections in *Gingles'* District 23, where half of the blacks elected were unopposed. 590 F. Supp. at 370. The Court finds unpersuasive, and indeed misleading, plaintiffs' argument that some black-supported candidates "lost in six of the eight City Council elections since 1970 and lost in all three elections held in the 1980's." *See* Plaintiffs' Memo on Remand at 38, Table 2. The record reflects, and this Court finds, that in each of the eight staggered term elections, at least one first or second choice black-supported candidate was elected; therefore, since 1974 there have been at all times at least two sitting Council members who received black majority support. *See* Def. Ex. 470 (A-F); 1986 Stip.

As the Fourth Circuit noted on remand,

> Unlike the situation in the disputed . . . districts at issue in *Gingles*, . . . black voter registration and turnout have recently increased in Norfolk. The district court acknowledged that fact, *see e.g.*, 605 F. Supp. at 402, 404, as did this Court in its first opinion, *see* 768 F.2d at 574-55. This factor is probative, but not dispositive, of black electoral participation, and there is no reason to believe that the district court viewed it as inordinately important.

816 F.2d 939.

At oral argument on remand, plaintiffs' counsel represented to this Court that the Fourth Circuit had settled the issue of black electoral success in Norfolk as a matter of law. Transcript of December 16, 1987 Oral Argument ("O.A.") at 59-60. Mr. Parker said, in response to questions from the Court, that the following language, which he quoted, was a ruling of law, binding upon this Court:

> The myriad numbers before this panel seem to indicate a consistent level of political success by Norfolk blacks that nevertheless is not as conspicuous as that achieved by the black community in North Carolina District 23.

816 F.2d at 937 (footnote omitted). Counsel argued that this language barred this Court from ruling on the matter. By omitting the sentence immediately following the portion he presented, and by omitting footnote 5, counsel seriously misstates the law of the case. The omitted sentence in the quoted passage makes it absolutely clear that the Fourth Circuit is not substituting its judgment on matters of fact for that of the District Court when it says:

> *On remand, the district court must determine* whether, as a factual matter, black electoral success in Norfolk has been so consistent and nearly proportional as to overshadow any racially po-

> larized voting and other factors tending to dilute minority political access.

Id. (emphasis added).

The omitted footnote further undercuts plaintiffs' interpretation of the Fourth Circuit's remand opinion:

> The question is not, however, so simple as how many blacks versus whites were elected. The court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities.

Id. at n. 5. Plaintiffs' counsel's selective citation did not stop there. Counsel also argued that the Fourth Circuit had ruled that several candidates who had received a majority of the black vote in particular elections could not, as a matter of law, be counted as examples of "minority electoral success." O.A. at 59-61. On this basis, plaintiffs' counsel would exclude Mrs. Howell and Mr. Staylor as candidates of choice in 1974, when Mr. Bond received more black votes than they did, but lost, and would exclude Mrs. Howell in 1980 when Mrs. Butts received more black votes but lost. *Id.* at 61.

In 1974, with CCN support, Mrs. Howell ran second out of twenty-one candidates among black voters, running ahead of three black candidates among black voters. In 1980, Mrs. Howell, with CCN endorsement, beat Mrs. Butts by over 2,300 votes, and received more than twice the black votes received by plaintiff George Banks. In 1984, Mrs. Howell again beat Mrs. Butts as a result of Mrs. Butts' decline in black support. Def. Ex. 470 (A, C, F). Delegate Robinson confirmed Mrs. Howell's black support. Tr. 1668.

Mr. Staylor, endorsed by CCN, received votes of 56.5 percent of all black voters in 1974, ahead of three black candidates, including plaintiff Milton Reid. Def. Ex. 470

(F). Delegate Robinson testified that Mr. Staylor was supported by blacks in 1974, Tr. 1667, and Judge Jordan testified that Mr. Staylor "had the overwhelming support of the black community when he first ran for Council." Tr. 1535. The evidence strongly indicates that Mrs. Howell in 1974 and 1980, and Mr. Staylor in 1974, were in fact candidates of choice of the black community and that any presumption created by the defeat of the first-choice candidates in those elections has been rebutted. Again, counsel misstates, by selective omissions, the law of the case, quoting that:

> The mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice.

O.A. at 61 (citing 816 F.2d at 937). When asked by the Court whether the quoted language is a presumption or a ruling of law, counsel said "[I]t is binding on this Court. It's a legal holding of the Fourth Circuit" O.A. at 59. Again, omitted language contradicts counsel's words. The paragraph concludes:

> Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

816 F.2d at 937. *See also id.* n. 6 ("[t]his may have been the case in the 1974 and 1980 elections in Norfolk . . ."). A presumption may be rebutted.

Based on this Court's detailed investigation of the particular factual circumstances of the elections at issue here, the Court finds that the presumption of nonrepresentation has been overwhelmingly rebutted as to the challenged candidates' status as chosen representatives of the minority voters.

ii. Endorsements by Black Civic Groups

Another indication of which candidates are the candidates of choice of the black community is the endorsement of certain candidates by black civic organizations.

The Concerned Citizens of Norfolk (CCN), is the leading black civic group involved in the elections at issue here. CCN has endorsed 25 candidates between 1972 and 1986, 15 of whom have been elected (60 percent). 605 F. Supp. at 400; 1986 Stip. Officials of CCN testified in favor of retaining Norfolk's present at-large City Council electoral system. Tr. 1632 (Testimony of Evelyn Butts); Tr. 1659-63 (Testimony of William P. Robinson, Jr.). In 1986, CCN endorsed four candidates, two of whom won. 1986 Stip.

CCN's position as the bellwether of black support is demonstrated by the election statistics for Dr. Mason Andrews. In 1978, Dr. Andrews, with CCN endorsement, received 43.5 percent of the black vote. In 1982, he lost that endorsement, and received a scant 5.8 percent of black support. Def. Ex. 470 (D and B). This figure rose to 38.4 percent in 1986 when CCN again endorsed him. 1986 Stip.

Plaintiff Dr. Milton Reid sought, but did not receive, CCN's endorsement in 1974, and failed to win even half the black votes. Plaintiff George Banks ran in 1980, in a field of twelve with one other black candidate. CCN endorsed the other candidate, Mrs. Butts, who received 92.9

percent of the black vote. Mr. Banks received only 36 percent. In 1982, plaintiff Collins and plaintiffs' counsel Mr. Gay each received less than 30 percent of the black vote without CCN support. 605 F. Supp. at 400. Likewise, in 1976 and 1980, G. Conoly Phillips ran without CCN endorsement, *see id.*, receiving 2.9 percent and 2.7 percent of the black vote in the respective elections. Def. Ex. 470 (C, E). With CCN endorsement in 1986, his support among blacks increased to 29 percent, without which he would have lost the election. 1986 Stip.

In 1982, plaintiff Swindell, a black, ran for the Virginia legislature from the predominately black 89th District, but lost to the white, CCN-endorsed candidate Robert Washington, after seeking and failing to receive CCN endorsement. Tr. 181-82 (Testimony of William E. Swindell, Jr.).

Additionally, Joseph Leafe, who was endorsed by CCN in 1984 but who did not receive black majority support, still received more black support with the CCN endorsement than did two black candidates who lacked that endorsement. 605 F. Supp. at 400.

At the time of trial, six of the seven City Council members were endorsed by CCN in at least one of their campaigns. *Id.* Plaintiffs' expert Dr. Engstrom conceded that four of the seven members of City Council as of July 1, 1984 could not have been elected without the support of black voters, and were accountable to the black community for their election. Tr. 1017. Five of the seven present Council members, all of whom were elected or re-elected in 1984 or 1986, could not have been elected without the black support they received. A sixth councilman, Paul Fraim, probably also depended on black voters' support. *See* Def. Ex. 470 (A-I); 1986 Stip. This dependence on black support necessarily reinforces the City Council's responsiveness to the particularized needs of the black community.

Another black endorsement group, the Rainbow Coalition, supported two candidates in the 1984 election, both of whom were elected. *See* Def. Ex. 470 (A); 480. In 1986, three of the four Rainbow Coalition candidates won. *See* 1986 Stip.

6. Special Circumstances Affecting Black Success

Because some apparent minority success may be due to special circumstances, the Court can appropriately take account of the circumstances surrounding any recent black electoral success in deciding its significance. 106 S. Ct. at 2780. The Supreme Court did not decide what types of special circumstances would demonstrate that apparent sustained minority success does not accurately reflect the minority's ability to elect its preferred representatives. *Id.* at 2780 n. 38. It merely held that blacks' political successes in some of the challenged North Carolina districts were not dispositive of plaintiffs' vote dilution claim because of unusual organized political support for blacks in those elections by white leaders concerned to forestall single-member districting. *Id.* at 2780 (citing 590 F. Supp. at 367).

The *Gingles* trial court noted in passing, and discussed in a footnote, what it termed the "obviously aberrational aspects" of the most recent North Carolina elections, which tended to cast doubt on the validity of the apparent gains made by North Carolina's black citizens in achieving success at the polls. Although the district court did not enumerate specific examples, the court emphasized evidence of "unusual organized political support by white leaders concerned to forestall single-member districting" in elections during the pendency of the litigation, noting that because "this cannot be expected to recur" the validity of black candidates' apparent success in the recent elections is "a matter of sheer speculation." 590 F.2d at 367 and 367 n. 27.

The *Collins* plaintiffs argue that every successful black candidate in the last twenty years has won due to special

circumstances, and that therefore none of these victories should be considered a black electoral success. A comparison of the circumstances in *Gingles* with those in Norfolk will therefore be helpful.

The district court in *Gingles* said that North Carolina's recent history gave intimations that a "more substantial breakthrough of success could be imminent," but stated, as noted above, that "there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation." *Id.*

The court said:

> In any event, the success that has been achieved by black candidates to date is, standing alone, *too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities* to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

590 F. Supp. at 367 (emphasis added).

Writing for the *Gingles* Court, Justice Brennan noted that the trial court could properly take into account the fact that the pending litigation could have artificially boosted black candidates' success in 1982, indicating in a footnote that this success could have been engineered by white politicians in order to block the litigation. 106 S. Ct. at 2780 and 2780 n. 37 (citation omitted). An additional exceptional circumstance occurred in the 1982 State House election in Durham County. Although the black candidate won one of the three available seats, there were only two white candidates, making the black candidate's victory a certainty. 590 F. Supp. at 368 n. 31.

This Court finds none of these aberrational factors in Norfolk's City Council elections, but will address each of plaintiffs' allegations in turn.

a. Mayor Thomas' Support for Reverend Foster

Plaintiffs' Memo on Remand suggests that black School Board member Reverend John Foster's election to City Council in 1984 was the result of "special circumstances" and was therefore was not probative of black electoral success. The alleged "special circumstances" were the former Mayor's decision not to seek re-election and to back a black candidate, and his remark that this case might become moot after the election.

This Court earlier found that former Mayor Vincent Thomas' decision not to seek re-election was not part of any conspiracy to elect John Foster and thereby to moot the instant lawsuit. 605 F. Supp. at 393. However, in its directions on remand, the Fourth Circuit stated that even in the absence of a conspiracy, "if voting patterns show unusual white support for the black candidate [Foster] in 1984, the legal significance of his success should be diminished." 816 F.2d at 938 (citations omitted). The Fourth Circuit therefore requested that this Court "examine the result of [Former Mayor Thomas'] conduct and statement," adding, "As long as that particularized investigation is made, however, the trial court's findings should not be disturbed on appeal unless they are clearly erroneous." *Id.*

It is clear from a comparison with *Gingles* that in the Norfolk elections there was no "obviously aberrational" pattern of white support such as that which occurred in the North Carolina elections. Neither Mayor Thomas' "mootness" remark nor his decision not to seek re-election in 1984 and to support a black candidate for election resulted in unusual white voting patterns in that election. Nor did his actions or inactions, or, indeed, the pendency of this lawsuit, have any other effect on the 1984 elections

that would tend to diminish the probative value of black electoral success in that election.

Mayor Thomas testified that his support for Reverend Foster predated the commencement of plaintiffs' suit and that his decision not to seek re-election was for personal reasons. Plaintiffs produced no credible evidence to the contrary. There was no evidence that Mayor Thomas or any other white city officials or community leaders "orchestrated" Reverend Foster's election. The Court finds no evidence that Mayor Thomas' words and actions affected the 1984 elections in any way that would violate the Voting Rights Act.

There was no evidence of unusual white voting patterns in the 1984 election. In the 1984 City Council elections, ten candidates competed at-large for three available seats. There were two strong black candidates, Reverend John Foster and Evelyn Butts, but the white voter turnout was lower in 1984 than in any of the three previous elections. The percentage of white registered voters who turned out to vote was substantially lower than the percentage of black registered voters who turned out to vote. *See* Def. Ex. 470 (A); 605 F. Supp. at 386.

Neither Reverend Foster, who was elected, nor Mrs. Butts, who was not, received unusual white support in 1984. Reverend Foster received 26.6 percent of white support, and Mrs. Butts received 24.2 percent. This was less than the white support given Joseph Green in 1982 (31.1 percent) and in Green's first election in 1978 (32.2 percent). It was also less than the percentage of whites voting for Joseph Jordan in his first election in 1968 (28.7 percent). Indeed, it appears that had Mrs. Butts not lost a great deal of black support (down from approximately 93 percent in 1980 to approximately 72 percent in 1984) she, too, would have been elected to City Council, raising black incumbency to three of seven members. Her narrow defeat by a 400-vote margin cannot be attributed to white bloc

voting nor to any other factor than her decline in support among black voters. *See* Def. Ex. 470 (A-I).

Thus, while at least 26.6 percent of the white voters were willing to vote for one black candidate and at least 24.2 for the other, they did not turn out in unusual numbers, nor did they channel their support to the candidate allegedly picked by Mayor Thomas. The votes for Butts and Foster showed roughly the same geographic distribution, and this distribution was similar to the vote distribution for Reverend Green in 1982. *See* Def. Ex. 475 (A and B); Def. Ex. 476. All in all, the election of a black in 1984 was consistent with past three-seat elections. In four of the five three-seat elections since 1968, a black candidate has been elected. 605 F. Supp. at 389.

b. The "Westside Coalition"

Plaintiffs also argue that the 1984 election was unique because the so-called "westside business coalition" allegedly left one seat open for Reverend Foster by running only two white candidates. This is merely a variation on the previous argument: that white officials somehow engineered Reverend Foster's election. The evidence, discussed above, simply does not support such a finding. Plaintiffs' argument is weakened further by their reliance on testimony by Dr. Engstrom, who did not study the 1984 election in his polarization study, Tr. 1006, and who never studied political endorsements. Tr. 1000. The Court notes that notwithstanding the alleged absence of a third white candidate on the "business" ticket, there were, in all, six white candidates in the 1984 election. The Court finds that Foster defeated four white candidates because of his strong following in the black community. The Court therefore finds that the 1984 election was not aberrational, was not the result of special circumstances, and was not the result of any action or inaction of Mayor Thomas or any other white citizens or officials, singly or in combination.

The results of the 1986 election, in which there were at least four strong white candidates for four Council seats, bear out the finding that the 1984 election was not aberrational. In 1986, Reverend Joseph Green won re-election, although four candidates received more white votes than he did, maintaining black representation on City Council at two of seven seats. He placed second in overall votes, defeating at least one white candidate (Wright) who received over 60 percent of the white vote. Far from being an aberration, this pattern of black electoral success built upon strong black community support, CCN endorsement (and more recently, Rainbow Coalition endorsement), and a steady white cross-over vote is indicative of the non-polarized nature of Norfolk's City Council elections.

c. Lack of an Opponent

The Court likewise finds that, contrary to plaintiffs' suggestions, there has been no Norfolk City Council election in which a black candidate won because there was no white opponent. In such a case, the election of the black candidate would certainly be the result of special circumstances, and therefore less probative of black electoral success. In *Gingles*, for example, there were several elections in the challenged North Carolina districts in which black candidates won because there were fewer white candidates than there were seats available. Necessarily, one black candidate had to be elected. *See* 106 S. Ct. at 2772 n. 29; 590 F. Supp. at 369-70. The Supreme Court noted that the absence of an opponent might constitute a special circumstance that would explain apparent black electoral success. 106 S. Ct. at 2772. However, in two decades such a situation has not presented itself in Norfolk. On the contrary, blacks have consistently won, even when there were enough white candidates to fill the available seats several times over.

d. Incumbency

Likewise, Reverend Green's incumbency at the time of the 1986 election does not make his re-election an aberration. In *Gingles*, the Supreme Court found that a successful minority candidate's incumbency could be a special circumstance, like the lack of an opponent, "bullet" voting, or other unusual factors, and that an incumbent's re-election did not necessarily negate a finding that racially polarized bloc voting usually defeated the black-preferred candidates. *See* 106 S. Ct. at 2770, 2772 and 2772 n. 29. The Supreme Court did not rule that re-elected incumbents must not be counted in evaluating blacks' overall electoral success. It merely ruled that sporadic black successes do not outweigh a pattern of black losses due to polarized white voting, such as the Supreme Court found in *Gingles*. In Norfolk, incumbency is one predictor of victory, to be sure: as previously shown, the re-election rate of black incumbents is 100 percent, which is greater than that of whites. Moreover, in Norfolk, unlike North Carolina, black-preferred candidates do not usually lose; they usually win. That some of the winners were incumbents does not negate the overall pattern of black success in Norfolk elections. The consistent willingness of white voters, as well as black, to re-elect black incumbents and to elect other blacks clearly shows that white bloc voting will not consistently defeat minority candidates in Norfolk.

e. Appointment of Joseph Green

Plaintiffs also argue that Joseph Green's appointment to fill the vacancy left by Joseph Jordan's appointment to the bench was another "special circumstance" within the *Gingles* standard. This argument is also without merit. When Reverend Green ran for election for the first time, in 1978, he received 96.1 percent of the black vote, and was elected, although he came in sixth with white voters and only five seats were available. Although he received a solid base of white support (32.2 percent), this was not

significantly greater than the 28.7 percent of white support given Joseph Jordan in his first election in 1968, or the 26.6 percent given John Foster in 1984, although neither Jordan nor Foster was previously appointed. *See* Def. Ex. 470 (A, D and I). It is evident that no unusual white support resulted from Reverend Green's appointment.

Green's appointment and subsequent election presents a far different situation than that in *United States* v. *Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984) cited by plaintiffs. In *Marengo*, no black candidate had ever been elected. The one black citizen appointed to the School Board had never faced election. *Id.* at 1572. In those circumstances, the Eleventh Circuit said, "The appointment of one black to the School Board . . . certainly does not demonstrate the ability of black voters to elect officials," and added "[n]either would his subsequent *unopposed* re-election." *Id.* and 1572 n. 47 (emphasis in original). The *Marengo* decision is thus clearly inapposite to the instant case, where black candidates have regularly run for office and won election in hotly contested campaigns with large fields of candidates.

The other case upon which plaintiffs rely, *McMillan* v. *Escambia County, Florida*, 638 F.2d 1239 (5th Cir. 1981), is likewise not pertinent to the present inquiry. In *McMillan*, two blacks were appointed to the Pensacola City Council, and both subsequently won re-election, although no black had previously been elected. One of the two appointees had previously run and been "soundly defeated by the usual white bloc vote." *Id.* at 1241 n. 6. These two exceptions did not, however, negate the general pattern of total black electoral failure in Pensacola and in Escambia County. *Id.*

It does not follow that, because Reverend Green was originally appointed to fill Judge Jordan's vacated seat, his subsequent decade of successful re-election campaigns in which he received 96.1 percent, 88.2 percent and 90.3

percent of black voter support should be disregarded or treated as an aberration. On the contrary, based on this Court's careful examination of the factual circumstances of each election under consideration here, it is clear that Reverend Green's electoral success is legitimate and is not the result of special circumstances as contemplated in *Gingles*.

f. Single-Shot or Bullet Voting

Plaintiffs' allegation that the at-large system vitiates black electoral success by forcing black voters to cast fewer votes than are available to them (that is, to use "single-shot" or "bullet" voting) is likewise without merit. The Supreme Court noted, as discussed above, that "bullet" voting may be a special circumstance that will explain an occasional black success in the face of racially polarized bloc voting. *Id.* at 2770. The Court also quoted the Senate Report's conclusion that "anti-single shot" restrictions may violate Section 2. *Id.* at 2759.

The Supreme Court did not, however, say that use of single-shot voting was probative of a violation. Norfolk's black voters have on occasion successfully employed single-shot tactics. 605 F. Supp. at 389. It is abundantly clear, however, that it has not been necessary for blacks to depend on single-shot voting to win. While Norfolk's black voters generally trail white voters slightly in numbers of votes cast per voter, in 1976 and 1982, with more white candidates running than seats available, black voters cast slightly more votes per voter than did white voters, and successfully elected their preferred candidates without single-shot tactics. *See* Def. Ex. 470 (B and E) and 472.

Norfolk has no restrictions on single-shot voting. This Court, therefore, finds that black electoral success has not been adversely affected either by restrictions on single-shot voting or by a need to rely on single-shot voting.

7. The Proportionality of Black Representation

The next question is whether black representation on Norfolk's City Council has been so nearly proportional as to preclude relief under Section 2 even if there were legally significant, racially polarized voting.

In *Gingles*, a black-supported candidate had won in every election held in House District 23 (Durham) from 1973 through 1982. 590 F. Supp. at 366. The district court nevertheless found a Section 2 violation based on its determination that House District 23 was deficient in all but one of the Senate Report factors, 590 F. Supp. 345, including the fact that three of the six successful black candidates were unopposed. *Id.* at 370.

The United States Supreme Court reversed, saying, "This persistent proportional representation is inconsistent with [the] allegation that the ability of black voters in district 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." 106 S. Ct. at 2780 (Brennan, J.) (plurality).

Although this portion of *Gingles* was a plurality opinion, Justice Brennan was joined in reaching this conclusion by Justices White, Burger, Powell, Rehnquist and O'Connor. Writing for four of the Justices, Justice O'Connor noted

> Blacks comprise 36.3% of the population in [District 23], and constitute 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black .... Indeed, the 23 Court of Appeals' decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in district 23.

Id. at 2794-95 (O'Connor, J., concurring in part). Thus, under *Gingles*, a Section 2 claim will be defeated if the black community is proportionally represented, notwithstanding any other factor. This holding does not create an entitlement to proportional representation, which is expressly denied by the language of Section 2.

On remand, this Court must determine as a factual matter whether black electoral success in Norfolk "has been so consistent and *nearly proportional* as to overshadow any racially polarized voting and other factors tending to dilute minority political access." 816 F.2d at 937 (emphasis added). The Court finds that it has been.

As in District 23, candidates supported by a majority of black voters have won in every Norfolk election since 1972, and even earlier (1968). Since 1972, the Council has at all times had at least two members (28.6 percent) and in some years three members (42.9 percent) who had been supported by a majority of black voters in their last election. Further, from 1972 to 1986, black-preferred candidates in Norfolk have won an average of 34.5 percent of the City Council seats. The figures for black-supported candidates include Mrs. Howell and Mr. Staylor in 1974, and Mrs. Howell in 1980, who were candidates of choice of the black community in those particular elections, as the Court found above. These percentages are derived by averaging the percentage of seats won since 1972. *See* Def. Ex. 470 (A-G); 1986 Stip. If each election is averaged separately, the percentage of seats won by black-preferred candidates is 34.2 percent. This figure is still roughly proportional to the 1980 total black population figure of 35.2 percent, and it exceeds the 1980 black Voting Age Population (VAP) of 31.5 percent, as well as the 1970 figures for both VAP (24.1 percent) and total population (28.3 percent). *See* 605 F. Supp. at 382; Def. Ex. 107.

This Court finds as a factual matter that blacks in Norfolk have had roughly proportional representation for

longer than the time considered relevant for District 23 in *Gingles*, and holds as a matter of law that this finding of fact precludes relief under Section 2.

8. Slating

In the original *Collins* opinion, this Court found plaintiffs' contention that Norfolk City Council elections have been controlled by the "westside businessmen's coalition" to be unsupported by credible evidence. The Court held, "[P]laintiffs failed to prove the existence of a candidate slating organization which denies black candidates access to the process." 605 F. Supp. at 391.

The Fourth Circuit, in remanding the case, took exception to this Court's definition of a candidate slating process. The Appeals Court held that a definition of a slating group as a group which offers candidates for *all* slots on the ballot was overly restrictive. 816 F.2d at 938-39. The Fourth Circuit stated, "[T]he fact that the alleged slating group in Norfolk sometimes endorsed candidates without giving endorsements for all available seats might be a *factor* in finding that it was not a slating organization that denied access to minorities, that fact does not contravene the Senate Report factor as a matter of law." *Id.* at 939 (emphasis in original).

Accordingly, this Court now reconsiders the evidence in the record related to the existence of slating, and the arguments presented by both sides in light of the Appeals Court's definition of slating.

a. Indicia of Slating in Norfolk

The existence of slating is significant because it is one of the factors to be considered in determining whether or not there has been a violation of Section 2 of the Voting Rights Act. The Senate Committee on the Judiciary described the factor as follows:

> [I]f there is a candidate slating process, whether the members of the minority group have been denied access to that process

S. Rep. at 28-29.

In their memoranda on remand, plaintiffs contend that the record clearly shows that black voters in Norfolk were denied access to the candidate slating process of the westside business coalition during the 1976 and 1980 elections. Plaintiffs argue that during these elections the alleged slating group "recruited, ran and supported slates of successful (except for Phillips in 1980) white candidates in the 1976 and 1980 city council elections, and that they excluded any black candidates from their slates of candidates." Plaintiffs' Reply Brief at 29.

Plaintiffs claim that in the 1976 Norfolk City Council election, the westside business coalition put up a slate of candidates consisting of Vincent Thomas and G. Conoly Phillips, and that Joseph Jordan, a black candidate, was "excluded because of his race." The only evidence plaintiffs point to in support of this conclusion is the deposition testimony of Vincent Thomas. The following deposition excerpt was quoted in plaintiffs' brief:

> A. I had some talks with Judge Jordan about the general political situation in Norfolk. But no, there was no consideration of a ticket including Judge Jordan.
>
> Q. Why not?
>
> A. This was the political decision that was made at the time.
>
> Q. And why was that political decision made? What was some of the reasoning behind it?
>
> A. The reasons were political reasons. We felt that our primary goal was to get elected. We wanted to have as many things in our favor to

get elected as possible. And so the decision was made that our best interest would be served by running the two of us in association.

Q. Do you feel it would hurt your ticket if you had included Judge Jordan?

A. At the time, that was just not a reasonable political possibility.

Q. What was not a reasonable political possibility?

A. Running the three as a ticket.

***

Q. I'm trying to understand your testimony, Mayor. What was not a reasonable political possibility?

A. That there be a ticket of Mr. Phillips, Judge Jordan and myself.

Thomas Deposition at 20-22.

What plaintiffs failed to include in their brief is the following exchange, which occurred between the quoted portions above.

Q. So it was not a reasonable political possibility at the time to include a black on a ticket with two whites; is that right?

A. I didn't say that. I said under the circumstances that were then in Norfolk and the candidates involved, that that was not a possibility.

Q. Not a possibility to include a black on your ticket:

MR. CHAPPELL: That is not what he testified to. You keep coming back and testifying yourself, Mr. Parker. I object to the form of your question.

Id. at 21.

Seemingly, plaintiffs' attorney was attempting to have Mr. Thomas say that Mr. Jordan was excluded from the ticket on the basis of his race. In their brief on remand, plaintiffs conclude, "[T]he slating group believed that including a black candidate on the slate would compromise their 'primary goal,' which 'was to get elected.' " Plaintiffs' Reply Brief at 28. Plaintiffs offer no evidence to substantiate this bald assertion. The deposition testimony quoted in plaintiffs' brief took place in the context of discussing the inclusion of Joseph Jordan on the ticket with Vincent Thomas and Conoly Phillips. Even if, as plaintiffs allege, someone involved with the Thomas-Phillips ticket made a conscious decision not to include Joseph Jordan on the ticket, it does not necessarily follow that all blacks were discriminatorily denied access to a slating process. Indeed, in the 1976 Norfolk City Council election there were a number of other candidates who were also not included on the Thomas-Phillips ticket. Characterizing Mr. Thomas' deposition testimony as evidence of a discriminatory slating process requires drawing a number of inferences that are not supported by the evidence.

With respect to the 1980 election, plaintiffs claim, "proof shows that the Thomas-Phillips-Leafe ticket was a slate [from] which black candidates were excluded, and that the slate was identified as a business community ticket." Plaintiffs' Reply Brief at 28. In their brief, plaintiffs also make the statement, "Thomas admitted that in 1980 no consideration was given to including a black candidate in the Thomas-Phillips-Leafe slate." *Id.* at 28-29. The portion of Mr. Thomas' deposition testimony plaintiffs apparently rely on for this statement is as follows:

> Q. Was there any consideration given by either you or, to your knowledge, Mr. Phillips, to recruiting a black to be on the ticket in 1980?
>
> A. I cannot remember specifically, except to say that in the political discussions, everything is normally considered.
>
> Q. But you cannot specifically recall any specific consideration given to including a black?
>
> A. No. Well, let me—at the time we were interested in having qualified people on the Council, yes.
>
> Q. Well, what does that mean?
>
> A. Well, that means that we considered everybody.
>
> Q. But you did not specifically discuss including a black person?
>
> A. I really just can't recall that.
>
> Q. Was there any reason why you did not give active consideration to including a black person?
>
> A. I can't recall that, either.

Thomas Deposition at 37-38. A careful reading of the testimony shows that Mr. Thomas did not "admit" that a black candidate was not considered.

In a similar vein, plaintiffs claim that Joseph Leafe's deposition testimony confirms that no consideration was given to a black candidate. Plaintiffs' Reply Brief at 28-29. The testimony cited by plaintiffs to support their assertion is as follows:

> Q. Did you give any consideration to including a black person on your ticket?
>
> A. Well, I guess my answer is that I didn't have any input into the—I became the third person.

So at that point in time, you know, there weren't any considerations left.

What considerations they may have had before that, I just really couldn't speak to.

Q. So you don't know of any considerations that might or might not have been given to include a black?

A. No, I didn't.

Leafe Deposition at 67. As with the testimony of Mr. Thomas, the testimony of Mr. Leafe simply does not support plaintiffs' conclusion that no black candidate was considered.

Defendants contend, on the other hand, that Norfolk had no slating group or process that adversely affected the representation of blacks on the Norfolk City Council. In its earlier opinion, this Court, citing *McIntosh County Branch of the NAACP* v. *City of Darien*, 605 F.2d 753 (5th Cir. 1979), described various courts' concern with slating groups as "whether a small group of whites, acting as a formal or informal slating organization, effectively limits the ability of blacks to seek electoral office by excluding black candidates from its slating process." 605 F. Supp. at 403-04. Defendants argue that the situation in Norfolk, of which plaintiffs complain, if it was slating at all, is not the offensive type of slating discussed in the Senate Report and in case law, and that Norfolk blacks have not been disadvantaged by a discriminatory slating process.

b. Effects of Alleged Slating on City Council Elections

After considering all the evidence, this Court finds a number of factors relevant to its consideration of the slating issue. Initially, it is important to note that the influence of the alleged slating group in Norfolk City Council

elections is relatively small. In the ten elections held between 1968 and 1986, there have been a total of 38 City Council seats available. Yet, plaintiffs allege offensive slating in only two nonconsecutive elections. Furthermore, these instances of alleged slating involved only five slots and three individuals: Vincent Thomas, Conoly Phillips and Joseph Leafe.

In 1976, one of the years in which plaintiffs allege slating, Joseph Jordan, a black, won, coming in third among white voters and beating seven white candidates, two of whom were incumbents. Def. Ex. 470 (E). While the Court of Appeals stated that failing to endorse a full slate does not preclude the possibility of a group being a slating group, a partial slate may be a factor to consider. 816 F.2d at 939. With respect to the 1976 election, it is certainly relevant that the alleged slating group filled only two of three available seats and a black candidate prevailed over numerous white candidates for the third seat.

This Court made the following unchallenged findings concerning the 1980 election in the original *Collins* decision.

> With regard to the 1980 election, Joseph Leafe testified that he was asked to run by then Mayor Thomas. Leafe had decided not to run again for the Virginia House of Delegates, in which he had served as a member from 1972 to 1980. Leafe stated that he did not have discussions with either Joshua Darden or Harvey Lindsey, identified during the trial by the plaintiffs as leaders of the "westside businessmen's coalition," before he decided to run. Leafe was not recruited to run by any single group; rather he was encouraged to run by voters from throughout the City. Leafe ran with Thomas and Phillips in 1980 and the three shared election expenses. They did not consider themselves to be a businessmen's slate.

> Leafe and Thomas were elected; Phillips was not. There is no evidence that the three candidates were recruited by a slating organization. It is more likely that the two incumbents, who had run together successfully in the 1976 election, sought a third candidate who shared their stance on the issues and who would be willing to share campaign expenses.

605 F. Supp. at 390-91.

The 1980 election results support the conclusion that the alleged westside businessmen's slating group did not control the City Council elections and did not deny blacks access to the process. In the 1980 election, the candidate who received the greatest number of votes, Mrs. Howell, was supported by CCN, but not by the westside businessmen. *See id.* at 400; Def. Ex. 470 (C). Conoly Phillips, an incumbent and member of the alleged westside slate, was not re-elected and received fewer votes than black candidate Evelyn Butts. Significantly, following the 1980 election only two of seven members of the Norfolk City Council had been supported by the alleged westside business slating group. *See* Def. Ex. 470 (C).

c. The Supreme Court's Interpretation of the Significance of the Slating Factor

In remanding *Collins*, the Fourth Circuit conceded that there is "no consensus in federal law or in political science texts on a definitive meaning of the phrase 'slating group.' " 816 F.2d at 938. However, the Court did cite two Supreme Court cases, *White* v. *Regester* and *Whitcomb* v. *Chavis*, which it considered important sources for the phrase "slating group."

In *White* v. *Regester*, a voting rights case, the Supreme Court required the plaintiffs to prove that members of the group in question "had less opportunity than did other residents in the district to participate in the political proc-

esses and to elect legislators of their choice." 412 U.S. 755, 766 (1973). In *White*, the district court had found that the Dallas Committee for Responsible Government (DCRG) was a "white-dominated organization that [was] in effective control of Democratic Party candidate slating in Dallas County." *Id.* at 766-67. The lower court had also found that without the endorsement of DCRG it was "extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination." *Id.* at 767 n. 11. Finally, the lower court found, and the Supreme Court affirmed the finding, that because of the black community's exclusion from participation in the Democratic Party selection process, blacks had been generally excluded from entering the political process in any "reliable and meaningful manner." *Id.* at 767.

Similarly, in *Whitcomb* v. *Chavis*, the Supreme Court discussed slating in the context of the plaintiffs' ability to "participate in the political processes and to elect legislators of their choice." 403 U.S. 124, 149 (1971). In *Whitcomb* the court found that the plaintiffs, inhabitants of the ghetto, had not been excluded from the political process because they had had the opportunity to run for office on the Democratic ticket. The court found no evidence to support a conclusion that the plaintiffs "were regularly excluded from the slates of *both* major parties, thus denying them the chance of occupying legislative seats." *Id.* at 150 (emphasis added) (footnote omitted).

Under *White* and *Whitcomb*, slating is offensive when it has the effect of excluding a minority from reliable and meaningful participation in the political process. The facts of this case do not support the conclusion that this type of slating has been employed in Norfolk City Council elections to the detriment of Norfolk blacks. The only two alleged incidents of slating did not even occur in consecutive elections. Plaintiffs have failed to bear their burden of establishing by the greater weight of the evidence that the alleged westside businessmen's group refused to in-

clude candidates on their ticket based on the candidates' race, or that they so dominate the political scene as to deny blacks access to the electoral process. And, significantly, there is no evidence before this Court which would support the conclusion that a westside businessmen's group controlled Norfolk City Council elections, or even had an inordinate amount of influence over who became members of City Council. On the contrary, the evidence, discussed above, supports a conclusion that election to Norfolk City Council is not dependent on or hindered by any alleged slating process.

Accordingly, this Court finds that plaintiffs have failed to prove the existence of a candidate slating organization which denies blacks access to that process.

9. Responsiveness to the Minority Community's Needs: The East Ghent Redevelopment

In its original opinion, this Court found no lack of responsiveness of Norfolk's officials to the needs of the black community, finding that Norfolk's black community is "well-represented on the more important boards and commissions" and that there is no evidence that minorities are under-represented in City employment. 605 F. Supp. at 394-95. This Court also found that the Libraries, Fire, Human Resources, Police, Health, Parks and Recreation, Public Works, Public Utilities, Community Improvement, Housing Services, Cemeteries and Public School Departments are all responsive to the needs of black citizens. *Id.* at 395-97. These findings were not disturbed on appeal.

This Court also found that, contrary to plaintiffs' allegations, the Norfolk Redevelopment and Housing Authority ("NRHA") had been responsive by replacing slum housing on a one-for-one basis with "decent, safe and sanitary housing." *Id.* at 397. This Court further found that NRHA had not violated federal law with regard to racial balance in public housing, that HUD regulations prevent the use of quotas to achieve racial balance, and that Nor-

folk is a well-integrated city. *Id.* at 398-99. On remand, the Fourth Circuit did not challenge this Court's findings on these housing issues. 816 F.2d at 939.

The only factual finding on responsiveness on which the Fourth Circuit requested clarification was the question of the relocation of black residents from the East Ghent slums. *Id.* This Court originally found that the decisions of the NRHA to relocate black families from East Ghent and to redevelop East Ghent to attract middle-income families were not racially motivated. 605 F. Supp. at 398. On remand from the Supreme Court, the Fourth Circuit held that this Court, instead, should determine whether these decisions were unresponsive to the needs of black families relocated from East Ghent, without regard to motive. 816 F.2d at 939. This Court now finds that these NRHA decisions not only lacked racial animus, but also were not unresponsive to the needs of the East Ghent black families.

All parties agree that prior to redevelopment, the East Ghent neighborhood, which was largely, if not entirely, occupied by blacks, was severely run down. NRHA director David Rice described the area as being:

> . . . in very bad condition. Drainage was very bad. If an area was low, it flooded. The sewer system was worn out and improperly built in the first place, and I would say the housing conditions were almost as bad as some of the earlier conditions in Norfolk after World War II.

Tr. 1751. Rice went on to characterize the area as a "slum". *Id.* NRHA concluded that the housing conditions were so bad that redevelopment required that they demolish the existing housing rather than rehabilitate it. Tr. 1752. Accordingly, the approximately 1,800 families who had been occupying the East Ghent slum housing, the great majority of whom were black, were relocated to other public housing projects and private housing in Norfolk. Tr. 1739, 1741, 1757, 1790, 1818. In moving these families,

NRHA complied with its procedures that families displaced by NRHA programs be moved to "decent, safe and sanitary housing." Tr. 1739-41. NRHA also complied with the requirements of the U. S. Department of Housing and Urban Development (HUD) that withdrawn low-income and moderate-income housing be replaced on a one-to-one basis with other low-income and moderate-income housing, Tr. 1741-42, 1754-55, and that persons displaced by HUD-funded projects be adequately relocated. Tr. [Riddick] 2921-22.

Plaintiffs contend, however, that NRHA was unresponsive to the needs of the East Ghent black families in failing to provide new low-income housing in East Ghent. There were indications at the beginning of redevelopment that such housing would be built in order to allow displaced families to move back to East Ghent. Tr. 1757-58. In fact, the first project built in the East Ghent redevelopment was 150 units of subsidized housing for the elderly. Tr. 1754. However, in 1974, a presidential moratorium on federal subsidies for private housing eliminated most of the HUD funds for the East Ghent redevelopment. Tr. 1753-54, 1762. At about that same time, NRHA decided to redevelop East Ghent so as to attract middle-income families back into downtown Norfolk. Tr. 1754. On the one hand, NRHA's decision was motivated by the need to broaden Norfolk's tax base. Tr. [Riddick] 2915, 2921. HUD concurred with Norfolk's assessment that its tax base needed to be strengthened. Tr. [Riddick] 2915. On the other hand, NRHA wanted to aid in rejuvenating Norfolk's downtown. Tr. 1763. Attracting middle-income families back into downtown Norfolk was consistent with good city planning and was considered by Rice to be a very important part of accomplishing the rejuvenation. Tr. 1763-64. Certainly, the East Ghent black families, as well as other Norfolk residents, were well served by a NRHA policy aimed at ensuring that public services were adequately provided, encouraging a higher quality of life, re-integrat-

ing the inner city area and providing more job opportunities. *See* Tr. [Riddick] 2915. East Ghent's zoning was changed to accommodate NRHA's redevelopment goals, but this zoning change did not prohibit later development of subsidized housing in East Ghent. Tr. 1755-56. Furthermore, the East Ghent development was open to all races. Tr. 1764-65 (Testimony of David H. Rice).

In light of these circumstances, the Court must conclude that the relocation of the East Ghent black families to other housing, and the subsequent redevelopment of East Ghent to attract middle-income families, was not unresponsive to the needs of the East Ghent black families.

III. Conclusion

Plaintiffs' burden in establishing a Section 2 claim is to demonstrate that under the " 'totality of circumstances' . . . the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have *less opportunity than other members of the electorate to participate* in the political process, *and to elect representatives of their* choice." 106 S. Ct. at 2763 (quoting S. Rep.) (emphasis added).

This determination must be based on "a searching, practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." *Id.* at 2764 (citations omitted). This reality is peculiarly dependent upon the facts of each case.

Having made such a searching, practical evaluation and considering the totality of the circumstances, this Court finds no Section 2 violation. The reality of Norfolk's electoral process is radically different from the reality of the North Carolina districts found to violate Section 2 in *Gingles*. Norfolk's strong black political organizations, consistent white cross-over voting, large candidate fields and the many other factors discussed above combine to give

black citizens a strong voice in Norfolk's City government. While the plaintiffs personally have been unsuccessful when they have run for City office, this Court finds that this lack of success is due to their individual inability to attract a significant following among voters of either race, or to gain the support of Norfolk's black political leaders in their efforts. Their lack of success is not the result of vote dilution cognizable under Section 2 as interpreted in *Gingles*. This Court finds that Norfolk's black voters are usually successful in electing their preferred candidates; that there is no legally significant racial bloc voting in Norfolk, and that the success of black-preferred candidates in Norfolk is so nearly proportional to the black population as to preclude the change sought under Section 2 even if there were legally significant racial bloc voting.

This Court therefore finds that Norfolk's at-large system for the election of City Council members does not violate Section 2 of the Voting Rights Act, and judgment shall enter for the defendants.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia
February 3, 1988

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1819

Herbert M. Collins; Dr. H. Marks S. Richard; Barbara C. Parham; William E. Swindell, Jr.; Dr. Milton A. Reid; Norfolk Branch, National Association for the Advancement of Colored People; George Banks; and Julian Hazel,

Appellants,

versus

City of Norfolk, Virginia, a municipal corporation; Vincent J. Thomas, Mayor; Dr. Mason C. Andrews; Joseph A. Leafe; Rev. Joseph N. Green, Jr.; Claude J. Staylor, Jr.; Robert E. Summers; and Mrs. Elizabeth M. Howell, members of the Norfolk City Council; City of Norfolk Electoral Board; Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, members of the City of Norfolk Electoral Board,

Appellees.

On Remand from the Supreme Court of the United States.
85-1300.

Argued: December 9, 1986 Decided: April 9, 1987

Before ERVIN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Frank R. Parker (William L. Robinson; Samuel Issacharoff, Lawyers' Committee for Civil Rights Under Law; James F. Gay on brief) for appellants; R. Harvey Chappell, Jr. (Paul W. Jacobs, II; Christian, Barton, Epps, Brent & Chappell on brief) for appellees.

ERVIN, Circuit Judge:

This case is on remand from the United States Supreme Court. *See Collins v. City of Norfolk*, 54 U.S.L.W. 3866 (U.S. July 7, 1986) (vacating *Collins v. City of Norfolk*, 768 F.2d 572 (4th Cir. 1985)). The Court remanded the case for consideration in light of *Thornburg v. Gingles*, 54 U.S.L.W. 4877 (U.S. June 30, 1986) ("*Gingles*").[1]

The facts were developed succinctly in this court's first opinion, *see* 768 F.2d at 573-75, and fully in the trial court's opinion, *see Collins v. City of Norfolk*, 605 F. Supp. 377 (E.D. Va. 1984). The case involves a challenge to the City of Norfolk's at-large system of voting for city council members. The plaintiffs allege that this system violates the requirements of § 2 of the Voting Rights Act, 42 U.S.C. § 1973.[2] The Senate Judiciary Committee Majority Report

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[1] The *Gingles* decision affirmed in part and reversed in part a decision of a three-judge panel, *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), which had held that a redistricting plan of the North Carolina General Assembly diluted black citizens' votes in a number of challenged districts.

[2] Those requirements, as amended in 1982, read as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this

accompanying the bill that amended § 2 in 1982 noted seven "typical factors" that were probative of a § 2 violation. These factors were originally derived from *White v. Regester*, 412 U.S. 755 (1973), and they form the framework for § 2 analysis under the amended statute. Interpretation of these factors and their application to the facts at hand are the central problems in this case:

> 1. The extent of any *history of official discrimination* in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is *racially polarized*;
>
> 3. the extent to which the state or political subdivision has used *unusually large election districts, majority vote requirements, anti-single-shot provisions*, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

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section.

(b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are *not equally open to participation* by members of a class of citizens protected by subsection (a) of this section in that its members have *less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973, as amended, 96 Stat. 134 (emphasis added).

> 4. if there is a *candidate slating process*, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as *education, employment and health, which hinder their ability to participate effectively in the political process*;
>
> 6. whether political campaigns have been characterized by *overt or subtle racial appeals*;
>
> 7. the *extent to which members of the minority group have been elected to public office in the jurisdiction.*

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07 (emphasis added). The Report stresses that this list is neither comprehensive nor exclusive and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 29. The Report "espouses a flexible, fact-intensive test for § 2 violations," *Gingles*, 54 U.S.L.W. at 4881, but it limits the proof of a § 2 violation in three ways.

> First, electoral devices, such as at-large elections, may not be considered *per se* violations of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. . . . Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. . . . Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Id. The *Gingles* decision is essentially a gloss on these factors and limiting circumstances.

The essence of a § 2 claim, as characterized in *Gingles*, is that some electoral characteristic interacts with social and historical conditions to create an inequality in minority and majority voters' ability to elect their preferred candidates. 54 U.S.L.W. at 4882. It is essential for plaintiffs to prove that minority and majority voters consistently prefer different candidates, and that the majority, by virtue of its numerical superiority, will usually defeat the choices of the minority. *Id.*

The minority must show three things as a threshold matter:

1. That it is sufficiently large and geographically compact enough to make a majority, if it were voting in a single-member district;

2. that it is politically cohesive; and

3. that the majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as an unopposed minority candidate—*usually* to defeat the minority's preferred candidate. *Id.* at 4882-83.

The implication of this gloss on § 2 is that, of the seven primary factors on the Senate Report list, two are typically the most important: the existence of *racially polarized voting*, which establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates, and the *actual results* of minority-preferred candidates in winning elections.

The opinions in *Gingles*, while not amounting to lucid explication of all features of the amended § 2, make clear that certain legal errors were committed in trying this case below. We summarize those errors here, and remand to the district court for reconsideration in light of *Gingles*.

I. RACIALLY POLARIZED VOTING

The legal standard for the existence of racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were nor whether there were other factors present in contested elections, such as "white backlash." The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates—if so, there is the requisite minority political cohesiveness—and to see whether the majority vote is sufficiently homogenous to cancel the minority vote plus the cross-over vote. These inquiries together determine whether there is a "pattern of racial bloc voting that extends over a period of time," a critical factor in a claim of vote dilution under § 2.

The district court in this case used an erroneous definition of racially polarized voting. The plaintiffs' definition, offered to the court, was that "racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group." The court rejected this in favor of the defendants' definition, which contained three elements:

> First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates.

605 F. Supp. at 386. This choice was wrong, as *Gingles* makes clear. The trial court should not inquire into the first and third elements in determining the existence of polarized voting.

There is no consensus in *Gingles* on the proper role of causation evidence concerning voting patterns, except that

such evidence cannot be used to rebut the claim that there is racially polarized voting.[3] The district court's definitional use of the concept of "white backlash" and the lack of white attempts to limit the field of candidates cannot be defended on the basis of any of the *Gingles* opinions. On remand, the court should pursue the question solely through the analysis of voting patterns, without seeking to explain why those patterns exist.

The district court in this case also rejected plaintiffs' studies of voting patterns due to methodological problems. The problems included, but apparently were not limited to, the lack of data from the mostly white Norfolk naval station residents. *See* 605 F. Supp. at 387. It is unclear from the opinion whether these methodological problems, leading to rejection of the plaintiffs' polarization studies, also included the failure to isolate variables other than

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[3] Section III(c) of Justice Brennan's opinion for the Court is a plurality section, joined by three other Justices. It says that evidence of other causes for minority bloc voting, such as economic status, party affiliation, incumbency, and the race of the candidate preferred by the minority, is irrelevant to the whole § 2 inquiry. Justice White wrote separately to say that the race of the *candidates* is an important additional factor that could be considered in the inquiry into the existence of racially-polarized voting. One cannot infer from this separate opinion, as plaintiffs suggest, that Justice White agrees that *other* factors, such as socio-economic status, have no place in the entire § 2 case. Justice O'Connor, joined by the Chief Justice and Justices Powell and Rehnquist, concurred separately and said that these other factors should not come in on the question of the existence of racially polarized voting, but should be admitted on the question of whether white bloc voting will consistently defeat minority candidates.

It is difficult to square the plaintiffs' assertion that causative factors are entirely irrelevant with the need to consider special circumstances that might explain particular minority successes, such as white reaction to the filing of a § 2 lawsuit. Those special circumstances are, in essence, other causation factors. For this reason, the separate concurrence of Justice O'Connor is more persuasive in explaining that causation evidence may play a role, albeit not in defining "racially polarized voting."

race in the voting behavior analysis. It is within the trial court's discretion to find that methodological flaws undercut the probative value of a study so deeply as to render it inadmissible. *See, e.g., United States v. 25.406 Acres of Land*, 172 F.2d 990, 993 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949); Fed. R. Evid. 403. But the failure to include causative factors that purport to explain voting patterns cannot be a basis for rejecting plaintiffs' studies on the existence of polarized voting. And given that this case was tried before a judge, the studies should have been admitted unless their methodological flaws were so severe as to render them irrelevant or totally misleading.

The racially polarized voting factor is one of the two cardinal factors identified by *Gingles*. The district court's error in defining it cannot be discounted. It is crucial to the legitimacy of the political system that questions about its fairness be answered unambiguously. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a correspondingly more searching judicial inquiry"). Overly restrictive definitions of elements required to be proven by civil rights plaintiffs can act as blinders on justice, and so must be avoided.

II. MINORITY ELECTORAL SUCCESS

The Court in *Gingles* reversed the part of the district panel decision that found a § 2 violation in North Carolina House District 23 (Durham). The fact that blacks in District 23 had enjoyed proportional representation since 1973 mandated judgment for the defendants.[4]

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[4] Justices Brennan and White thought that the district panel had erred as a matter of law in ignoring this degree of success, 54 U.S.L.W. at 4890, whereas the Chief Justice and Justices Powell, Rehnquist and O'Connor thought that the holding was "clearly erroneous" because

A black citizen has been elected to the Norfolk City Council, comprised of seven members, in every election since at least 1972. 605 F. Supp. at 405. The district court found further that "white candidates who have been the choice of a majority of the black electorate have been elected to the Council consistently over the years." *Id.* at 405. The district court concluded: "blacks and candidates of choice of the black community have been elected to public office in Norfolk." *Id.* at 405.

The district court did not find that the black community in Norfolk had achieved proportional or nearly proportional representation. *Gingles* makes clear only that a minority cannot prove a § 2 violation in the face of continued and proportional success at the polls. The myriad numbers before this panel seem to indicate a consistent level of political success by Norfolk blacks that nevertheless is not as conspicuous as that achieved by the black community in North Carolina District 23.[5] On remand, the district court must determine whether, as a factual matter, black electoral success in Norfolk has been so consistent and nearly proportional as to overshadow any racially polarized voting and other factors tending to dilute minority political access.

The factfinder must use great care in assessing what counts as a "minority electoral success." The mere election

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insufficient weight was given to the black voters' success, *id.* at 4897. Justice Stevens, joined by Justices Marshall and Blackmun, dissented from the holding concerning District 23, believing that the district court finding of vote dilution was supportable despite the continued election of one out of three representatives by black voters. *Id.* at 4898.

[5] One black (14%) was on the Norfolk City Council from 1968 until 1984, when two blacks (28%) were elected. Blacks constitute somewhere between 30 and 35% of the relevant Norfolk population. The question is not, however, so simple as how many blacks versus whites were elected. The court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities.

of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice.[6] Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

Similar difficulties arise in assessing "special circumstances" that may explain minority electoral success. The three-judge district panel in *Gingles v. Edmisten* found that the pendency of the § 2 lawsuit reduced the weight to be accorded black electoral success in the 1982 election. In contrast, the district court in this case found that the 1984 election of a second black to the Norfolk City Council was not a result of a "conspiracy" to moot this lawsuit. 605 F. Supp. at 393. The Supreme Court in *Gingles* reaffirmed the importance of investigating beyond the surface outcome of an election when evaluating minority success; a trial court must consider, for example, whether that success was prompted by an attempt to forestall Voting Rights Act litigation. *See* 54 U.S.L.W. at 4890; *see also Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973), *aff'd sub nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

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[6] This may have been the case in the 1974 and 1980 elections in Norfolk, when black candidates apparently received votes from more than 80% of black voters, but were not elected, while one or more white candidates received votes from 56 to 74% of black voters, and were elected.

Moreover, the absence of a conspiracy or an intent to moot this litigation does not end the district court's inquiry. The court should probe further to determine whether the black candidate's success in 1984, while this action was pending, resulted from unusual circumstances. Never before in the history of the city had two black councilmen served simultaneously. Nevertheless, the mayor supported a second black candidate for the first time. He coupled his unprecedented support with the public statement, "After the election, the issue of black representation may become a moot point."

The mayor's intent, or whether he and other white leaders conspired, is not dispositive. A proper inquiry must examine the result of the mayor's conduct and statement. If voting patterns show unusual white support for the black candidate in 1984, the legal significance of his success should be diminished. *See* 54 U.S.L.W. 4889-90. As long as that particularized investigation is made, however, the trial court's findings should not be disturbed on appeal unless they are clearly erroneous.

The presence of either of these two cardinal factors—voting that is severely polarized along racial lines or sustained minority electoral success that achieves proportional or nearly-proportional representation—would weigh very heavily in the ultimate determination that minority voters do not or do have equal access in the polity. But that ultimate determination still must be made on the basis of the "totality of the circumstances." Once the ultimate determination is made, the "clearly erroneous" test of Rule 52(a) is the appropriate standard for appellate review. *See* 54 U.S.L.W. at 4890; Fed. R. Civ. P. 52(a). However, the definitions and legal criteria—such as of "racially polarized voting"—must accord with law, and will be reviewed as legal questions.

III. OTHER SENATE REPORT FACTORS

The district court's definition of "a candidate slating process" was overly restrictive, and should be abandoned. The district court found no group of white citizens in Norfolk acting as a formal or informal slating organization which controlled access to the ballot. The district court accepted a definition of "slating group" proposed by one of the defendants' experts that put important emphasis on the fact that such a group proposes candidates for *all* available seats. Thus, two white businessmen who ran together for City Council in 1976 were not viewed as slated candidates, because they had no third running mate for the other vacant seat. *Gingles* did not change or refine the understanding of a "slating group" or "slating process."

There seems to be no consensus in federal law or in political science texts on a definitive meaning of the phrase "slating group." But there is no support in the law for the restrictive definition chosen by the trial court. In *White v. Regester*, 412 U.S. 755, 766-67 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124, 150-51 & n.30 (1971), two important sources for the phrase that ultimately made its way into the Senate Report, the Court viewed "slating" as essentially involving the endorsing of candidates. The Court did not explore whether the slating groups involved in those cases always filled all slots on the ballot. It strains common sense to suppose that an organization could regularly put up candidates for ninety-nine of one hundred slots on a ballot, yet escape being labeled a "slating organization" for purposes of § 2 analysis. On remand, the district court should avoid the use of highly artificial definitions to restrict the Senate Report inquiry. While the fact that the alleged slating group in Norfolk sometimes endorsed candidates without giving endorsements for all available seats might be a *factor* in finding that it was not a slating organization that denied access to minorities, that fact

does not contravene the Senate Report factor as a matter of law.

Unlike the situation in the disputed North Carolina districts at issue in *Gingles*, *see* 54 U.S.L.W. at 4879-80, black voter registration and turnout have recently increased in Norfolk. The district court acknowledged that fact, *see, e.g.*, 605 F. Supp. at 402, 404, as did this court in its first opinion, *see* 768 F.2d at 574-75. This factor is probative, but not dispositive, of black electoral participation, and there is no reason to believe that the district court viewed it as inordinately important.

The district court found no special electoral devices used in Norfolk that "enhanced the opportunity for discrimination against the minority group." 605 F. Supp. at 403. Many particular features of an electoral system, such as the lack of district residency requirements and the presence of staggered terms of office, may under some circumstances make it structurally more difficult for minorities to be elected. *Cf. Gingles*, 54 U.S.L.W. at 4880 ("procedures *may* operate to lessen . . . opportunity") (emphasis added). The question whether those procedures do so operate is a factual one, to be reviewed on the same basis as other factual matters. There is no indication that the district court clearly erred in finding no discriminatory devices in Norfolk.

Finally, the district court considered the plaintiffs' allegations of unresponsiveness to the needs of the minority community and found that the defendants had rebutted most of these allegations. The district court ruled that the plaintiffs had to prove that the removal of 1,800 families, most of whom were black, for redevelopment for housing for middle-income families, was racially motivated. This was the wrong legal test. Proof of discriminatory intent, as *Gingles* noted, is not required by § 2 of the Act, and it is not an element of proof of the factors mentioned in the Senate report. On remand, the district court should

determine whether the removal of these black families by city officials was unresponsive to their needs without requiring proof that the officials were racially motivated.

On remand issues may arise which are not addressed by this opinion. In this event, the district court should follow the mandate of the Supreme Court and consult *Gingles* for guidance.

REVERSED AND REMANDED.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 85-1300

Herbert M. Collins, *et al.*,

Petitioners,

v.

City of Norfolk, *et al.*

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this case is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Thornburg* v. *Gingles*, 478 U.S. ___ (1986).

IT IS FURTHER ORDERED that the petitioners, Herbert M. Collins, et al., recover from City of Norfolk, et al., Two Hundred Dollars ($200.00) for their costs herein expended.

July 7, 1986

Clerk's costs: $200.00

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1819

Herbert M. Collins; Dr. H. Marks S. Richard; Barbara C. Parham; William E. Swindell, Jr.; Dr. Milton A. Reid; Norfolk Branch, National Association for the Advancement of Colored People; George Banks; and Julian Hazel,

Appellants,

versus

City of Norfolk, Virginia, a municipal corporation; Vincent J. Thomas, Mayor; Dr. Mason C. Andrews; Joseph A. Leafe; Rev. Joseph N. Green, Jr.; Claude J. Staylor, Jr.; Robert E. Summers; and Mrs. Elizabeth M. Howell, members of the Norfolk City Council; City of Norfolk Electoral Board; Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, members of the City of Norfolk Electoral Board,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (C/A 83-526-N).

Argued: April 1, 1985 Decided: July 22, 1985

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Frank R. Parker (William L. Robinson; Patricia M. Hanrahan on brief) for Appellants; R. Harvey Chappell, Jr. (Paul W. Jacobs, II, Christian Barton, Epps, Brent & Chappell; Philip R. Trapani; Harold P. Juren; Lydia C. Taylor; Office of the City Attorney on brief) for Appellees.

MURNAGHAN, Circuit Judge:

Maintenance by the City of Norfolk, Virginia, of an at-large election procedure covering members of the City Council has led to a suit by the National Association for the Advancement of Colored People and seven black Norfolk voters contending that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973[1] had been violated. The suit also claimed infringement of the Fourteenth and Fifteenth Amendments through adoption in 1918 of the at-large election as a means to promote racially discriminatory objectives.

[1] (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Emphasis added).

The relief sought was replacement with a plan establishing seven single member districts, each with one representative in the City Council, together with a declaration of the illegality of and an injunction prohibiting the at-large system due to an unlawful dilution of black voting strength.

A bench trial lasting ten days and producing over 2100 pages of transcript and more than 590 exhibits resulted in a judgment in favor of the City of Norfolk and its officials joined as defendants. The issues raised, though sporting various guises, were essentially factual and, in the end, amounted to the assertion that the district judge, in his findings, was clearly erroneous. Manifestly, a heavy burden has been assumed on appeal by the parties who were unsuccessful in the district court. *Anderson v. City of Bessemer, North Carolina*, 53 U.S.L.W. 4314 (U.S. March 19, 1985).[2] Accordingly, we must examine the factual record "in light of the appropriately deferential standard" afforded the district court's findings. *Id.* at 4318.

Historically, in 1918, provision was made for a five-member City Council, each to be elected at-large. Each was to have a term of four years, with terms to be staggered, presumably to minimize the possible ill-effects of a 100% turnover, all at the same time. Between 1949 and 1952, the number of councilmen rose to seven. In 1968 a nine-member Advisory Study Commission, one of whose members was black, was created by the City Council to study and evaluate the 1918 Charter. Its report and recommendations appeared in 1971. It unanimously recom-

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[2] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . .

53 U.S.L.W. at 4317.

mended retention of staggered terms and at-large elections, agreeing that "councilmen should be elected by and be responsive to the entire community rather than a portion of it." The Commission also expressed a wish to avoid parochialism, which is another way of saying the same thing.

Since 1968, one member of the City Council has been black, Joseph A. Jordan, Jr. from 1968 to 1977, and Joseph Green from 1977 to the present. Jordan was vice mayor during his terms beginning in 1972 and 1976. Green has been vice mayor since 1982. In 1984, John Foster, another black, was elected to the City Council.[3]

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[3] A point pressed by the appellants was the asserted existence of a conspiracy to orchestrate Foster's election through the decision, after the institution of this suit, of a white candidate to abandon efforts to obtain reelection. Such interference with the election process would no doubt have been of immense significance to the ultimate outcome of the case, if proven. However, it was obliterated by the district judge's findings, which were not clearly erroneous, that the white candidate's withdrawal was for personal reasons and that his support for election of a second black antedated the filing of the suit. The district judge went on to find that "[t]here is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action."

The dissent contends that it was *clearly erroneous* for the district court to conclude that the city officials did not attempt to moot the instant lawsuit. To support its contention, the dissent highlights a newspaper article in which the Mayor of Norfolk was quoted as saying, "After the election, the issue of black representation may become a moot point." Whether that published statement which, on its face, amounts to no more than the expression of an opinion by no means necessarily inaccurate, constituted a subtle and improper racial appeal pivoted largely on the credibility of the Mayor's defense of that statement as well as a close factual examination of the general political mood in Norfolk at the time of the City Council election. Thus, we in the panel majority are hardpressed to upset the district judge's conclusion that Foster's election was not promoted for an improper purpose. *See Anderson v. City of Bessemer, supra*, at 4317.

Plurality voting governs in Norfolk. Single-shot voting is not prohibited, *i.e.*, casting votes for a full slate is not required.[4] The Norfolk rules impose no numbered place or residency requirements.[5] Since the passage of the Voting Rights Act in 1965, the black voter registration rate and

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[4] Although staggered terms can have the effect of frustrating single-shot voting, the district court found that the City of Norfolk adduced sufficient evidence at trial to prove that the staggered terms of the City Council members did not promote "head to head contests between [Blacks] and whites and [did not] deprive [Blacks] of the opportunity to elect a candidate by single-shot voting." *City of Rome v. United States*, 446 U.S. 156, 185 (1980). The district court noted that, if staggered terms were to have a discriminatory effect upon Norfolk's City Council elections, it would be likely that the elections for the fewest number of seats would not yield any black candidates. Yet the evidence demonstrated that in those elections in which the fewest number of seats—i.e., three—were open for election, a black had always been victorious. In light of such evidence, the district court's findings with respect to staggered terms cannot be deemed clearly erroneous.

[5] There is disagreement over whether residency requirements minimize the voting strength of racial minorities. *See Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (Without residency requirement all residents could reside in " 'lily-white' neighborhoods"). *Compare Perkins v. City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982), *aff'd*, 459 U.S. 801 (1982) (Ward residency requirement, *inter alia*, effectively prohibited single-shot voting and "enhance[d] the possibility that [City's] election scheme [was] being maintained for a discriminatory purpose"). The lesson to be derived is that any particular aspect of the voting process need not be absolutely good or bad. Rather the application in the particular case should control, and we should eschew generalities. Determining whether residency requirements, or the lack thereof, hinder the position of racial minorities within the electoral process requires a careful factual and statistical analysis of the specific political community under scrutiny.

In the instant case, the district court, after considering all of the evidence, concluded that the lack of a ward residency requirement did not enhance the opportunity for discrimination in elections for Norfolk City Council members. That conclusion was amply supported by the record. For example, the record demonstrated that the lack of a residency requirement did not water down the ability of black voters successfully to utilize single-shot voting nor did it result in "lily-white" representation.

turnout rate, based on a percentage of the black voting age population, have increased to the point that today they exceed those of Norfolk's white population. White registration is 51.2% of the white voting age population as against 52.9% for the black voting age population. Those figures developed by regression analysis are comparable to 53.1% white and 55.3% black on the homogeneous precinct analysis. Black voter turnout exceeded white voter turnout in the 1984 election. The black turnout rate was 11% higher.[6]

Norfolk's efforts to increase voter registration have been exemplary. In the 1984 election, six staff positions were equally divided, three and three in the main registration office. Of the 371 election officers, 102 were black.

The Concerned Citizens of Norfolk, a black political organization, endorses both black and white candidates and wields considerable clout. From 1972 through 1984, it had endorsed twenty-one candidates for the City Council. Thirteen (62%) have been elected, of whom five were black and eight white.

The municipal work force was 36.16% black in 1973, 41.31% black in 1983. Representation on major boards and commissions appointed by the City Council has been reasonably good. The parties stipulated that programs and services of the fire department, the library department and the Department of Human Resources did not discriminate against blacks and have been responsive to their needs.

There are other statistics which generally show improvement in the status and circumstances of blacks in Norfolk. The median income disparity ($17,548 for whites, $10,250

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[6] Those statistics came from studies introduced in evidence by the appellants. They did not cover the predominantly white residents of naval bases and ships. Had they been included, the statistics would have been even more striking as to black predominance.

for blacks), an endemic problem for the entire United States, has not been demonstrated to be related in any way to the procedures for election to the Norfolk City Council.

In amending in 1982 the Voting Rights Act, Congress called for consideration, in probing the totality of the circumstances, of the following factors:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in 1982* U.S. Code Cong. & Ad. News 177, 206-207. Those factors, while generally the most probative, are not exclusive. Congress, through the Senate Committee on the Judiciary, has made clear that at-large elections need not be eliminated. *Id.* p. 211. The test established by the 1982 amendments merely codified pre-existing law. *See, e.g., White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

Looking at the facts, as established by the record as a whole, and measuring the question presented by "the totality of the circumstances," we simply are not left with a firm conviction that an error has been committed by the district judge. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Perhaps, in such detailed and lengthy findings as the district judge made here it is inevitable that a phrase sprinkled here or there might occasion regret,[7] but the question is not whether we could

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[7] For example, the dissent contends that the district court, evidenced by his remarks throughout trial, "equated 'proportional political representation' with the institution of a ward system in which some wards will have a majority of black voters." However, the district judge's remarks must be read in the context of a rather long and difficult trial in which he was attempting to comply with the proviso in § 2 of the Voting Rights Act ("*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal

have done better—a matter of necessarily of some uncertainty—but whether the district judge to whom the resolution of factual disputes is finally allocated was clearly erroneous. We cannot say that he was. Accordingly, we affirm.

AFFIRMED.

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to their proportion in the population."). Thus, the district court, in contrast to the dissent's assertion, did not conclude, as a matter of law, that ward systems would be violations of that proviso but rather merely attempted to grapple with the interplay between the appellants' desired relief and a statutory prohibition.

BUTZNER, Senior Circuit Judge, dissenting:

The principal issues the appellants raise address errors of law to which the clearly erroneous rule does not apply. Pullman Standard v. Swint, 456 U.S. 273, 287 (1982). Because these assignments of error are meritorious, I would vacate the judgment of the district court and remand the case for consideration of the evidence in accordance with correct legal standards.

The appellants complain that the district judge denied them a fair trial because of his expressed antipathy to the conversion of an at-large electoral system to a ward system in which some wards would have a predominately black population. In support of their complaint, the appellants emphasize the following comments of the district court during the proceedings:

> Well, aren't you when you're asking for a ward system which will guarantee more blacks on [council], that is a quota system, isn't it?
>
> * * *
>
> That's the problem I have philosophically and I may be premature in raising it.
>
> * * *
>
> Well, the real question is whether segregated voting ought to be the rule of the day or integrated voting.
>
> * * *
>
> If you had a 100 percent black ward, there won't be any white candidates there for blacks to vote for, would there?
>
> See, what concerns me is you are espousing segregated voting, and that really concerns me as a matter of principle.

> We're trying to integrate housing, we're trying to integrate schools, we're trying to integrate jobs, we're trying to integrate society so it will work together, and your position is, as a very basic thing, which goes to how we live and how we get along together, and that is the right of franchise, you want to segregate. And that does concern me.
>
> * * *
>
> So your design, I take it, then is to see that the blacks get a certain quota of people on city council?
>
> * * *
>
> When you segregate them aren't you creating more problems than you're doing good?
>
> * * *
>
> They have voted for successful candidates, both black and white, and isn't that better in an integrated society than putting somebody in a color stockade and say this is the way you're going to do?
>
> * * *
>
> How is the establishment of a ward system going to correct [racial appeals]? How are you going to bring about a millenium of peace on earth and good will toward men by segregating the white vote and the black vote by establishing a ward system?

The court's characterization of the relief the appellants are seeking pervaded its perception of the entire proceedings. Thus, in the introduction to its opinion, the court wrote in discussing the "Applicable Law":

> Two competing legal principles are applicable in this case. The first is that political systems or

> practices which deny minority voters access to the political system have been repeatedly struck down by the courts. . . . The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. . . . These competing legal principles are directly involved in this case. (citations omitted)

The appellees respond that the district court was not biased and it did not deny the appellants a fair trial. On the contrary, they say, the concerns raised by the court

> were solely in the context of (1) whether a ward system in Norfolk would, in order to establish appellants' goals, require a quota system contrary to the express provisions of the Voting Rights Act and (2) whether wards in Norfolk would, as a practical matter, end cross-over racial voting patterns and coalition politics which presumably otherwise are to be encouraged.

I do not subscribe to the appellants' complaint of bias. The court's error was not due to prejudice. The error was the court's incorrect interpretation of the proviso found in section 2 of the Voting Rights Act, which states: "Provided, that nothing in this section establishes a right to have members of a protected class election in numbers equal to their proportion in the population." 42 U.S.C. § 1973. Both the appellees and the district court incorrectly have equated "proportional political representation" with the institution of a ward system in which some wards will have a majority of black voters.

Given the court's misperception of the proviso, judgment against the appellants was foreordained. It is wrong to remedy an illegal at-large system by substituting a proportional representation system; but it is not wrong to substitute a fairly drawn ward system even though some wards will have a majority of black voters. On more than

one occasion the Supreme Court has approved conversion of discriminatory at-large system to a ward system. The ward system must be fairly drawn, but if this condition is met, it is no impediment that some wards have predominately black residents and others have predominately white residents. For example, in City of Richmond v. United States, 422 U.S. 358, 372 (1975), the Court approved the replacement of an at-large electoral system for the city council with a ward system of four wards with a 64% black majority, four wards with a heavily white electorate, and one ward with a 40.9% black population. More recently, approving the conversion of an at-large system to a ward system in Rogers v. Lodge, 458 U.S. 613, 616, (1982), the Court observed that a minority may be unable to elect representatives in an at-large system, but it may be able to elect several representatives if single-member districts are established.

The appellants do not seek proportional representation. Instead, they seek conversion of an at-large system to a ward system. Nevertheless, in its discussion of "Applicable Law," the court confused an impermissible "proportional political representation plan" with a permissible ward plan. The court's perception that the relief the appellants sought competed with the rights secured by section 2 of the Voting Rights Act was a mistake of law that infected this entire proceeding. Indeed, the concerns the district court expressed during the trial about the remedy the appellants seek were similar to the views rejected by the Congress when it enacted the 1982 amendments to the Voting Rights Act. *See* Gingles v. Edmiston, 590 F. Supp. 345, 356-57 (E.D.N.C. 1984) (three-judge court), *prob. juris. noted*, Thornburg v. Gingles, 105 S. Ct. 2137 (1985).

Although the appellants contend that some of the district court's findings are clearly erroneous when tested by the precepts of United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the primary thesis of their appeal is the commission of errors of law. They assert that

the district court erred in applying the criteria prescribed by S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-207 (hereinafter cited as Senate Report). These criteria were derived from case law and should be interpreted in the light of that law.

One of the most important factors Congress directed courts to consider is the extent to which voting is racially polarized. The district court adopted a definition of polarization that required the appellants to prove "white backlash" and that "whites attempt to limit the field of candidates." In support of this definition, it cited a single case, United States v. Dallas County Commission, 548 F. Supp. 875, 904-05 (S.D. Ala. 1982). This case, however, has been reversed by a decision that recognized the existence of racial polarization without requiring proof of either additional element. *See* United States v. Dallas County Commission, 739 F.2d 1529, 1535-36 (11th Cir. 1984).

The definition of polarization the district court applied is contrary to precedent. The Supreme Court has recognized that racially polarized voting exists when there is "bloc voting along racial lines." Rogers v. Lodge, 458 U.S. 613, 623 (1982). *See* United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977) (voting following racial lines). *See also* NAACP v. Gadsen County School Board, 691 F.2d 978, 982 (11th Cir. 1982); City of Rome v. United States, 472 F. Supp. 221, 226 (D.D.C. 1979) (three-judge court), *aff'd*, 446 U.S. 156 (1980).

The additional elements the district court engrafted on the accepted definition of racially polarized voting require proof of intention to abridge the minority's voting rights. This is evident from the Court's insistence that minority complainants prove that "whites attempt to limit the field of candidates." But in enacting the 1982 amendments to the Voting Rights Act, Congress eliminated the necessity

of proving a discriminatory purpose to establish a violation of the Act. *See Senate Report* at 27, 1982 U.S. Code Cong. & Ad. News 205. The district court's interpretatior is contrary to the cardinal principle of the 1982 amendment.

Another factor deemed important by the Senate Judiciary Committee is a slating process to which the minority has been denied access. To determine whether this factor exists, the district court adpoted, without the citation of precedent, a restrictive definition of a "slate." The court required the appellants to prove a "permanent or semi-permanent organization" which solicits candidates to run for office and puts them up "for as many seats as are open." The legislative history offers no support for this definition. It is contrary to the accepted meaning of "slate," which Webster's *Third International Dictionary* defines as simply "the group of persons proposed for appointment, nomination, or election." Significantly, courts that have discussed slates or a slating process have not imposed the burdensome requirements initiated by the district court. *See* White v. Regester, 412 U.S. 755, 766-67 (1973); McIntosh County NAACP v. Darien, 605 F.2d 753, 758 (5th Cir. 1979).

The responsiveness of elected officials to the particularized needs of the members of the minority group is another factor mentioned in the Senate Report. In its inquiry about this subject, the district court required the appellants to prove that the relocation of approximately 1800 black families whose neighborhood was redeveloped for middle-income families was racially motivated. This was an error of law. It bears repeating that minority citizens are not required to prove a discriminatory purpose to establish their rights under section 2 of the Voting Rights Act. Faulty interpretation of the Act is not avoided by requiring proof of "racial motivation," for this term is simply a semantic disguise for "discriminatory purpose."

Contrary to Supreme Court precedent, the district court held that staggered terms and the lack of residency requirements do not enhance the opportunity for discrimination against minorities. *See* City of Rome v. United States, 446 U.S. 156, 185 (1980) (staggered terms); Rogers v. Lodge, 458 U.S. 613, 627 (1982) (lack of residency requirements). *See also* Jones v. Lubbock, 727 F.2d 364, 383 (1984) (staggered terms are evidence of violation of Section 2 of the Voting Rights Act). Additionally, staggered terms of office are cited as examples of objective factors of discrimination in both House and Senate reports. H.R. Rep. No. 227, 97th Cong., 1st Sess. 18 (1981); *Senate Report* at 143-44, 1982 U.S. Code Cong. & Ad. News 315-16.

It is not the function of this dissent to reassess the evidence in light of the correct principles of law. This can be undertaken by the district court on remand. It is enough to note that the district court's judgment is fatally flawed by its erroneous interpretation of statutory and case law and that application of proper legal standards to the evidence could alter the outcome of this litigation.

Nevertheless, a fact the district court omitted in its opinion deserves comment. The keystone of the appellees' defense was the election of a second black councilman in 1984 after this action was commenced. The appellants challenge the significance of this event. They point out that despite a long history of discrimination by city officials, the mayor for the first time supported a second black candidate for council. The appellants emphasize that the mayor publicly stated how the election of the candidate would affect this litigation in which the mayor was a defendant.

Testifying under cross-examination, the mayor admitted that he was quoted correctly in a newspaper article before the election:

> [Plaintiffs' attorney]: Now, the next to the last paragraph of that article, "The election of a second black Council member could influence the outcome of an NAACP suit seeking a ward system in Norfolk. The suit contends current at-large elections have prevented blacks from getting fair representation on Council and seeks to establish a ward system. The case is scheduled to be [heard] May 17 in the U.S. District Court.
>
> And then you're quoted here, Mayor, " 'After the election, the issue of black representation may become a moot point,' Thomas said."
>
> Do you agree with that?
>
> [Mayor]: Yeah, I said that. That's merely an observation. That has nothing to do with my motivation for supporting a black for City Council.

Regardless of his intentions about supporting a black candidate for an unprecedented second seat, the mayor seized on the opportunity of that candidacy to let his constituents know that a favorable vote for the black candidate could moot the issue of black representation, a development, of course, which he favored.

The mayor's published statement was a subtle racial appeal, of the type which the Senate report condemns, for implicitly it appealed to all who opposed the ward system, which was sought by the NAACP, to vote for the mayor's black candidate. The district court did not discuss this episode. Instead, it brushed aside the challenge to the appellees' defense as "innuendo." Without mention of the mayor's public statement about mooting the issue of black representation, the district court found: "There is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action."

Whatever the mayor did or did not do to "orchestrate" the black candidacy for a second seat, he certainly promoted it for an improper purpose. The mayor's tactic is not new. It has long been suspect. In a case from which the Senate Judiciary Committee derived the factors it prescribed, Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), the court said:

> [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. . . . [S]uch success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.

Because the evidence discloses that the mayor publicly represented that election of the black candidate, whom he supported, might moot the issue that is at the heart of this action, I cannot accept the notion that the district court's finding was not clearly erroneous.

I respectfully dissent.

APPENDIX F

JUDGMENT ON DECISION BY THE COURT FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA/NORFOLK DIVISION

CIVIL ACTION DOCKET NO. 83-526-N

HERBERT M. COLLINS, *ET AL*

vs.

CITY OF NORFOLK, VIRGINIA, *ET AL*

JUDGMENT

This action came on for trial before the court, United States District Judge J. Calvitt Clarke, Jr., presiding. The issues having been duly tried and a decision having been duly rendered, **it is ordered and adjudged** that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs his costs of action.

Dated at: Norfolk, Virginia

Date: July 19, 1984

W. FARLEY POWERS, JR.,
Clerk of Court

By /s/ Bonnie L. Day
Deputy Clerk of the Court

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk

By /s/ Bonnie L. Day
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 83-526-N

HERBERT M. COLLINS, DR. H. MARKS S. RICHARD, BARBARA C. PARHAM, WILLIAM E. SWINDELL, JR., DR. MILTON A. REID, NORFOLK BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, GEORGE BANKS, and JULIAN HAZEL,

Plaintiffs,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; VINCENT J. THOMAS, Mayor, DR. MASON C. ANDREWS, JOSEPH A. LEAFE, REV. JOSEPH N. GREEN, JR., CLAUDE J. STAYLOR, JR., ROBERT E. SUMMERS, and MRS. ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM, MARTHA H. BOONE, and PAUL M. LIPKIN, members of the CITY OF NORFOLK ELECTORAL BOARD,

Defendants.

MEMORANDUM OPINION

This matter is before the Court following a nonjury trial which was held on May 21 to June 5, 1984. After hearing the evidence, the Court directed the parties to submit post-trial briefs addressing the factual and legal issues raised. Post-trial briefs have been received, and therefore the matter is now ripe for decision.

The plaintiffs in this action are seven black residents and registered voters of the City of Norfolk, Virginia and the Norfolk Branch of the National Association for the Advancement of Colored People (NAACP). The defendants

are the City of Norfolk, the seven members of the Norfolk City Council who were serving when this action was filed, the Norfolk Electoral Board and the three members of the Electoral Board.

The plaintiffs allege that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973. Alternatively, they allege that the at-large system was adopted in 1918 and has been maintained for a racially discriminatory purpose in violation of their Fourteenth and Fifteenth Amendment rights and 42 U.S.C. § 1983.

The plaintiffs seek (1) a declaratory judgment that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength; (2) an injunction prohibiting the holding of future City Council elections under the at-large system; and (3) the replacement of the at-large system with a plan whereby all seven City Council members would be elected from wards or single-member districts. A motion to certify this action as a class action was denied by Order of February 23, 1984.

I. APPLICABLE LAW

Two competing legal principles are applicable in this case. The first is that political systems or practices which deny minority voters access to the political system have been repeatedly struck down by the courts. *See, e.g., White* v. *Regester*, 412 U.S. 755, 765-70 (1973); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1304-07 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam). The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. *See, e.g., Whitcomb* v. *Chavis*, 403 U.S. 124, 156-57 (1971). These competing legal principles are directly involved in this case.

Section 2 of the Voting Rights Act, as amended in 1982, reads as follows:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a matter *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its *members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: PROVIDED, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (Supp. 1984) (emphasis added).

Congress amended Section 2 of the Voting Rights Act to prohibit electoral practices and procedures that create discriminatory results, even though the responsible governmental body had not installed or maintained the elec-

toral practice or procedure in order to discriminate.[1] In amending the Act, Congress in effect overruled *City of Mobile* v. *Bolden*, 446 U.S. 55, 66-71 (1980), in which the Supreme Court held that a claim of denial of access to the political process by a minority group requires a showing of purpose to discriminate. Specifically, the *Bolden* Court held that both in an action based upon the Fourteenth and Fifteenth Amendments and in an action based upon Section 2 of the Voting Rights Act, as originally enacted, the plaintiffs were required to show an intent to discriminate. *Id.* at 62-65.

In amending Section 2, Congress sought to remove the requirement that proof of discriminatory intent was necessary to establish a violation of Section 2. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 179; *see Jordan* v. *City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983). Congress endeavored to codify the holding in pre-*Bolden* cases, specifically the holding in *White* v. *Regester*, 412 U.S. 755 (1973). In *White*, the Supreme Court held that to sustain a claim of vote dilution the plaintiffs' burden is:

> to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766.

To establish a violation of Section 2, plaintiffs may show a variety of factors in an attempt to prove their case. The

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[1] The defendants do not challenge the constitutionality of amended Section 2, which has been held to be constitutional by a number of courts. *See, e.g., Jones* v. *City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major* v. *Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983).

Senate Committee on the Judiciary included a list of typical factors in its report:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07.

Two additional factors listed in the Senate Report as having probative value are:

> 1. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> 2. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id.

The factors listed in the Senate Report are similar to the factors articulated originally in *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975) (per curiam). In *Zimmer*, the Fifth Circuit listed four "primary" or "principal" factors which should be considered in a vote dilution case. These factors are:

> 1. a lack of access to the process of slating candidates;
>
> 2. the unresponsiveness of legislators to the minority's particularized interests;
>
> 3. a tenuous state policy underlying the preference for multi-member or at-large districting; and
>
> 4. the existence of past discrimination which in general precludes effective minority participation in the election system.

Id. at 1305. The *Zimmer* court also listed four so-called enhancing factors, which tend to support the findings made relative to the four primary factors. These are:

> 1. the existence of large districts,
>
> 2. the existence of majority vote requirements;
>
> 3. the existence of anti-single shot voting provisions; and

> 4. the lack of provision for at-large candidates running from particular geographical subdistricts.

Id.

Both the *Zimmer* case and the Senate Report explicitly state that there is no requirement that the plaintiffs prove that all or even a majority of these factors are present. *Zimmer*, 485 F.2d at 1305; S. Rep. No. 417, 97th Cong., 2d Sess. 29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207. Rather, courts are to consider the existence, or lack of existence, of these factors in the *Zimmer* court's terms in the "aggregate," or as the language of Section 2 states, based upon the "totality of circumstances." It should be pointed out that the Senate Committee specifically stated that it did not intend that the factors be used "as a mechanical 'point counting' device." S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.118, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207.

This Court, therefore, will examine seriatim the factors listed in *Zimmer* and in the Senate Report. The Court will make detailed findings of fact with reference to each factor which the plaintiffs allege is applicable, as required by Rule 52(a) of the Federal Rules of Civil Procedure. The Court is aware of the requirement that it discuss all substantial evidence contrary to its opinion. *See Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1020-21 (5th Cir. 1984). The Court will then weigh the factors and determine whether, "based on the totality of circumstances," the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council "are not equally open to participation" by the black citizens of Norfolk, in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (Supp. 1984).

Should the Court determine that the plaintiffs have failed to prove a violation of Section 2 of the Voting Rights Act,

the Court will then consider whether the plaintiffs have proven that their Fourteenth and Fifteenth Amendment rights have been violated. *Bolden* remains the law with regard to constitutional violations. *See Chapman* v. *Nicholson*, 579 F. Supp. 1504, 1507 (N.D. Ala. 1984). The Court will determine whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk.

II. FINDINGS OF FACT

A. Introduction

According to the 1980 Census, Norfolk has a total population of 266,979 persons, of whom 60.8%, or 162,300, are white, and 35.2%, or 93,987, are black. The 1980 figures show that Norfolk has a total voting age population of 201,366, of whom 64.85%, or 130,595, are white and 31.48%, or 63,396, are black. Norfolk does not maintain voter registration figures by race.

The City of Norfolk currently is governed by a City Council consisting of seven members who are elected by the voters of the City in at-large elections. The seven members of the Council elect the mayor from amongst themselves. Members serve four-year terms, which are staggered. Three seats were at stake in the most recent election, which was held on May 1, 1984. The next election is scheduled for May, 1986, at which time the four remaining seats will be up for election. Elections are held every two years and always occur in even-numbered years.

At-large City Council elections have been held in Norfolk continuously since 1918, when a new City Charter was adopted. The Charter changed the form of City government to a city manager - council form of government.

Since at-large elections were instituted in 1918, three blacks have been elected to the Norfolk City Council. Joseph A. Jordan, Jr. was first elected to the City Council

in 1968, and was reelected in 1972 and 1976. He served as vice mayor during his last two terms. When Jordan resigned from his seat on Council as a result of having been appointed a judge, Reverend Joseph N. Green, Jr. was appointed to fill Jordan's unexpired term. Rev. Green was elected to the City Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. The third black, Reverend John Foster, won a seat on the City Council in the May 1, 1984 election. Accordingly, for the period of July 1, 1984 through June 30, 1986, the seven-member Council will have two black members, Rev. Green and Rev. Foster.

B. History of the Adoption of the At-Large System

The plaintiffs' historian, Dr. Peyton McCrary, and the defendants' historian, Dr. Peter Stewart, each presented their view of the history which preceded the adoption of at-large elections in Norfolk in 1918. The Court will briefly review that history, much of which is not in dispute.

The City of Norfolk received its Charter from the Crown and was incorporated as a borough in 1736. In 1845, Norfolk was incorporated as a city by the Virginia General Assembly. From 1816 to the present, the City Charters have provided for the at-large election of various municipal offices. The 1845 City Charter provided for a bicameral city council, consisting of the Common Council, which was elected at-large, and the Select Council, which was selected by the Common Council from amongst its own members. In 1873, the City Charter was amended to provide for the election of members of the Common Council from wards. The members of the Common Council continued to appoint the members of the Select Council. The mayor continued to be elected at-large.

In 1882, the Virginia General Assembly adopted a new charter for the City of Norfolk, which provided for the election of the Common Council members from wards and the at-large election of the Select Council. The mayor was

still to be elected at-large. Thereafter, control of the General Assembly changed hands, and in 1884 a new Norfolk Charter was adopted, which was indentical to the one adopted in 1873.

As a result of the adoption of the Virginia Constitution in 1902, which provided for a literacy test and a poll tax, most blacks and some whites were effectively disenfranchised. As a result of the imposition of these measures, black voter registration in Norfolk declined from 1,826 in 1900 to 504 in 1902. White voter registration also declined, from 6,732 in 1900 to 4,698 in 1902. The number of registered black voters, according to the State poll tax records for the City of Norfolk, fluctuated during the next fifteen years. The 1911 annexation of Huntersville, a predominantly black area, from Norfolk County resulted in an increase of from 38 to 154 registered black voters in that year. White voter registration also fluctuated during the period.

In 1906, the Virginia General Assembly adopted a new Norfolk Charter, which provided for the election of a Common Council of not less than fourteen nor more than forty members and a Board of Aldermen of not less than eight nor more than thirty members, each to be elected from wards. A three-member Board of Control, with combined legislative and administrative powers, was to be elected at-large. City officers, such as the Commonwealth's attorney, commissioner of revenue and city treasurer were to be elected at-large.

Efforts toward municipal reform were begun in Norfolk in 1913, by members of the Citizens Party, a group whose prime concerns were religion and morality. The black citizens of Norfolk were often associated with the Citizens Party. Members of the Norfolk Chamber of Commerce, which favored the adoption of a city manager form of government, were also aligned with the Citizens Party.

In August, 1915, the issue of whether to create a charter commission to study the adoption of a city manager form of government was submitted to Norfolk's voters. The measure was supported by a majority of those voting, but failed because it was not approved by a majority of all registered voters, as required by State law. The 1915 referendum had the support of the Norfolk Chamber of Commerce and the Citizens Party.

No further efforts for a new charter occurred until 1917, when State law was changed to allow voter approval of a charter change by a majority of the votes cast instead of by a majority of registered voters. In June, 1917, Norfolk's voters approved the establishment of a charter study commission. The Charter Commission issued the proposed charter in September, 1917, which provided for a city manager form of government and the at-large election of a small city council. A referendum on the adoption of the new charter was set for November 20, 1917.

The main dispute between the plaintiffs' and defendants' historians concerns the interpretation to be accorded a series of advertisements which appeared in *The Virginian-Pilot* newspaper in the days before the election. The plaintiffs' expert, Dr. McCrary, conceded that but for the appearance of these advertisements, he "would have found it easier to believe that the race issue did not surface." (Tr. 412). The Court is of the opinion that prior to November, 1917, race was not an issue in the charter change campaign.

The issue of race was first raised by opponents of the charter change on November 9, 1917, according to newspaper accounts. They charged that the new charter would increase the political power of blacks because of the abolition of the white primary. The first advertisement raising the issue of race appeared in *The Virginian-Pilot* on November 13, 1917, seven days before the referendum. In that advertisement, headlined "The New Charter a Danger

to White Supremacy," the opponents of the charter change claimed that passage of the charter would result in the qualification to vote of "nearly 2,000 Negro men." (Plaintiffs' Exh. 43). The opponents of the charter change repeated many of the same allegations in a November 16, 1917 advertisement entitled "White Supremacy."

The proponents of the new charter responded to the opponents' allegations in a November 17, 1917 advertisement headlined "Don't Let The Bosses Play Upon Your Sentiments." (Plaintiffs' Exh. 43). In the advertisement, the proponents argued that the issue of white supremacy and the black vote was irrelevant because the state qualifications for voting would remain the same under the 1902 Constitution. They repeated this argument in a November 19, 1917 advertisement.

After reviewing these advertisements, the Court adopts the view of defendants' expert, Dr. Stewart, that the issue of race was first raised by the opponents of the new charter and that the proponents of the new charter attempted to convince the voters that the real issue was efficient local government, not "the colored question." (Plaintiffs' Exh. 43). The charter proponents tried to convince the voters that the charter opponents were trying to distract them from the real issue, that is, whether a city manager form of government would be more effective.

On the date of the referendum, November 20, 1917, the state poll tax records show that approximately 360[2] blacks and approximately 7,910 whites were registered to vote in Norfolk. Based on these figures, blacks constituted just over 4% of the Norfolk electorate. In the most identifiably black precinct in the City, in Huntersville, there were be-

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[2] According to the plaintiffs' expert, Dr. McCrary, there were 361 blacks registered to vote on the day of the referendum. The defendants' expert, Dr. Stewart, cites a figure of 358. The Court has therefore used an approximate figure of 360.

tween 100 and 200 blacks qualified to vote in the charter referendum. The voters in that precinct approved the new charter by a vote of 121 to 32.

In 1918, the Virginia General Assembly adopted the new Norfolk City Charter. It provided for a five-member City Council, whose members were to be elected at-large for four-year terms. The terms were staggered such that three seats were to be filled during one election and the remaining two seats would be filled in an election two years later. The city manager was to be appointed by the Council. The mayor was to be elected from amongst the Council members.

C. The At-Large System To date

In 1949, the Norfolk City Council agreed unanimously to recommend to the Virginia General Assembly that the number of seats on the Council be increased from five to seven. According to the November 9, 1950 *Virginian-Pilot* article reporting passage of the referendum raising the Council membership to seven, black voters were "greatly in favor of the change." (Defendants' Exh. 38). The first election to a seven-member Council occurred in 1952.

In 1968, the City Council adopted a resolution which created an Advisory Study Commission to study and evaluate the Norfolk Charter of 1918. The Commission, after much deliberation and consideration of public comments, issued its report on November 3, 1971. The nine-member Commission unanimously recommended the retention of the at-large system for election of the members of Council because "councilmen should be elected by and be responsive to the entire community rather than a portion of it." (Defendants' Exh. 44). The report added that the "Commission wishes to avoid the dangers of a ward or district system which might encourage councilmen to look after the interests of their own district at the expense of the overall interest of the entire City." (Defendants' Exh. 44). Edward Delk, a black attorney,

was a member of the Commission. He testified at trial that he continues to favor retention of the at-large system.

The 1918 Norfolk Charter continues to be in effect today.

D. Extent of History of Official Discrimination

The early history of Virginia demonstrates efforts to defeat black participation in electoral politics. Black voters were effectively disenfranchised as a result of the 1902 Constitution, which imposed the literacy test and poll tax. The literacy test remained in effect until passage of the Voting Rights Act in 1965. The poll tax was declared unconstitutional by the Supreme Court in 1966. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). Blacks were also precluded from participating in the primary elections of the Virginia Democratic Party by the "white primary" rule which went into effect in 1912. The "white primary rule" was declared unconstitutional by the United States Court of Appeals for the Fourth Circuit in 1930. *Bliley* v. *West*, 42 F.2d 101 (4th Cir. 1930).

Prior to the passage of the Voting Rights Act in 1965, black voter registration in Norfolk was proportionately lower than that of whites. In 1960, for example 50% of the white voting age population was registered to vote while only 25.3% of the black voting age population was registered. By October, 1964, black registration had increased to 35% of the black voting age population, while white registration had decreased to 46% of the white voting age population.

Since the passage of the Voting Rights Act in 1965, the black voter registration rate and turnout rate, based on a percentage of the black voting age population, has increased to the point that today it exceeds that of Norfolk's white population. Currently, the black voter registration rate, based on a percentage of the black voting age population, exceeds that of whites, whether one looks at the

figures offered by the plaintiffs' experts or at those offered by the defendants' experts. The plaintiffs' figures show a white registration rate of 51.2% of the white voting age population and a black registration rate of 52.9% of the black voting age population under regression analysis. Under the plaintiffs' homogeneous precinct analysis, the white registration rate is 53.1% of the white voting age population and the black registration rate is 55.3% of the black voting age population.[3]

The black voter turnout rate, based on a percentage of the black voting age population, also currently exceeds that of white voters. The plaintiffs' figures show that the black turnout rate, based upon a percentage of the black voting age population, exceeded the white turnout rate in both the 1982 and 1984 City Council elections. In the May 1, 1984 election, the plaintiffs' figures show that the black turnout rate exceeded the white turnout rate by 11%.[4]

The City has made extensive efforts to increase voter registration and to make the registration process more accessible. According to the City's General Registrar, Ann Washington, as of May 31, 1984, there are twelve satellite voter registration offices located throughout the City of Norfolk. At least seven of these twelve satellite offices are located in or adjacent to predominately black areas. In addition, the City applied for and received blanket cov-

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[3] These figures exclude the population on Norfolk's Naval bases or ships home ported in Norfolk. This excluded population is predominantly white and has a low voter registration rate. Inclusion of this military population would result in a white registration rate of 37% of the white voting age population and a black registration rate of 57% of the black voting age population under regression analysis, according to the defendants.

[4] Again, the plaintiffs' figures exclude the predominately white military population. Inclusion of this population would show a black turnout rate, based on a percentage of the black voting age population, three times higher than that of whites in the 1984 election, according to the defendants.

erage permission from the Department of Justice under Section 5 of the Voting Rights Act to conduct voter registration drives. Such registration drives have been conducted at food stamp distribution centers, the Division of Motor Vehicles, high schools and multiservice centers.

The Court finds that despite an early history of discrimination in Virginia against blacks in terms of their ability to participate in the electoral process, Norfolk's black citizens today participate in the electoral process equally with white citizens. The procedures and facilities of the Registrar's Office are fair and equally accessible to all of Norfolk's citizens.

E. Racial Polarization

The plaintiffs and the defendants each offered their own definitions of "racially polarized voting." The plaintiffs' expert, Dr. Richard Engstrom, opined that racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group. The defendants' expert, Dr. Timothy G. O'Rourke, suggested that three factors must be examined in order to determine whether racially polarized voting has occurred. First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates.

The Court rejects the definition of racially polarized voting offered by Dr. Engstrom in favor of that presented by Dr. O'Rourke. Under Dr. Engstrom's definition, most of the elections in this country, including Presidential elections, would be characterized as racially polarized. For example, as Dr. Engstrom conceded, black voters consistently and overwhelmingly support Democratic Presidential candidates. In addition, Dr. Engstrom's definition would be more appropriate in a head-to-head race than in an

election such as that for the Norfolk City Council in which a voter may select more than one candidate. A vote for one candidate is not necessarily a vote against another candidate.

The Court is of the opinion that the definition offered by Dr. O'Rourke is a more sensible one. It is more applicable to the multiple-candidate, multiple-office Norfolk City Council elections. It is not overly broad, as is Dr. Engstrom's definition. Additionally, it more effectively considers voters' motivations in selecting particular candidates. Furthermore, Dr. O'Rourke's definition is consistant with the definition adopted by those few courts which have discussed the definition of racially polarized voting. *See, e.g., United States* v. *Dallas County Commission*, 548 F. Supp. 875, 904-05 (S.D. Ala. 1982). The Court will therefore employ Dr. O'Rourke's definition in determining whether the Norfolk City Council elections may be characterized as racially polarized.

1. White Backlash

Norfolk's white voters have not turned out in greater numbers than usual in response to the potential election of black candidates. For example, in the 1984 election there were two strong black candidates, Rev. John Foster and Evelyn Butts, yet the percentage of white registered voters who turned out to vote was substantially lower than the percentage of black registered voters who turned out to vote. As a matter of fact, the 1984 turnout rate for whites, as a percentage of the white voting age population, was lower in 1984 than in any of the three previous elections. The plaintiffs' expert, Dr. Richard Engstrom, conceded that he found no evidence of white backlash.

2. Voting Patterns

Since the City does not maintain voter registration or turnout figures by race, statistical estimates of voting behavior were used by both the plaintiffs and the defendants.

Such statistical estimates are subject to a variety of interpretations and can obviously be manipulated to support the desired result. An additional problem with these statistical estimates is that they are limited to raw numerical data, and in no way can they be said to reflect the rationale behind an individual's selection of a particular candidate.

The plaintiffs rely on two statistical studies, one prepared by Carl Peterson and Kimball Brace ("the Brace report")[5] and one prepared by Dr. Richard Engstrom, to prove that voting in Norfolk City Council elections is racially polarized. These two statistical analyses employed data consisting of the number of registered voters in each precinct, the number of votes cast for each candidate in each precinct, and the racial composition of each of the City's 54 precincts, as determined from the 1980 Census maps. Neither of the plaintiffs' experts' studies considers factors other than race which may greatly influence voting behavior. These factors include a voter's age, ethnicity, education and income. Other factors which may influence voting behavior include incumbency, campaign expenditures, endorsements and name recognition. None of these factors were considered in the Brace report or Dr. Engstrom's report.

That these factors are relevant become clear if one examines, for example, the effect of incumbency on City Council elections. An examination of the elections from 1968 through 1984 shows that the incumbency success rate is over 79%. In four of the nine elections, every incumbent who sought reelection was reelected. Since 1974, every black incumbent who has sought reelection has been reelected. There is a high correlation between incumbency and election to the City Council. Yet, the plaintiffs, while admitting that incumbency plays a role in City Council

[5] In referring to the Brace report, the Court refers to the third and final study prepared by Peterson and Brace, Plaintiffs' Exhibit 50-B.

elections, failed to adjust their figures to account for this factor.

Without going into great detail, the Court is convinced that the Brace report and Dr. Engstrom's report contain a number of methodological problems which cause the Court to doubt the credibility of the reports. Primary among these are the exclusion from both the Brace and Engstrom reports of those residing on Naval bases within the City limits or stationed aboard ships home ported in Norfolk. These individuals are eligible to register to vote in Norfolk City Council elections. This military population is included in the 1980 Census figures for Norfolk, and was included by the General Assembly of Virginia in the drawing of district lines for the election of the members of the Virginia Senate and House of Delegates, the State legislative bodies.

The plaintiffs' experts' reason for excluding this military population is that they are largely unregistered to vote and do not participate in City Council elections. Yet, the plaintiffs inexplicably included the City's student population, despite the fact that students also tend to be inactive members of the electorate. In addition, the plaintiffs' experts include in their studies the over 11,000 military personnel living off the Naval bases in private homes in the City.

The Court is convinced that this military population was excluded because of the effect of its exclusion on estimates of white voter participation. The racial composition of this excluded population is 84.5% white and 15.5% black, according to the 1980 Census data. Of the 33,892 members of the excluded military population who are of voting age, 84.3% are white and 15.7% are black. Exclusion of this population would have the effect of increasing white voter registration and turnout figures and, consequently, of decreasing black voter participation figures, as Dr. Brace conceded. The Court is of the opinion that the exclusion

of these 33,892 potential voters in the plaintiffs' experts' studies improperly skews the results of their studies.

A second methodological problem with the plaintiffs' experts' reports was their inclusion of the so-called "other population" in with the figures for the white population when preparing and analyzing the data. This "other" population, amounting to between three and four percent of Norfolk's population, includes Asians, Native Americans and others. In other words, the plaintiffs' experts included all non-blacks in their definition of whites. The plaintiffs' experts' reports purport to compare white and black voting behavior, yet they include non-white voters within the white category. This results in an increase in the number of white registered voters and in the white voter turnout in comparison to that of black voters.

The defendants relied on the testimony of Dr. Timothy G. O'Rourke and Dr. Justin G. Green to support their contention that voting in Norfolk City Council elections is not racially polarized. Dr. O'Rourke, in contrast to the plaintiffs' experts, considered such factors as endorsements and campaign expenses in reaching his conclusions. Drs. O'Rourke and Green avoided the methodological problems which the Court believes the plaintiffs' experts' studies suffer from. They did not exclude the military population from their analyses, nor did they include the "other" population in their studies. In addition, they went beyond the election figures, and studied newspaper articles and other data in reaching their conclusions. The Court attaches greater weight to the analyses of the defendants' experts Drs. O'Rourke and Green than to the studies of the plaintiffs' experts Dr. Engstrom, Brace and Peterson, finding them to be more credible and persuasive.

The Court's review of these studies and analyses leads it to conclude that the voting patterns reveal a substantial crossover vote. For example, in the 1978 election, 32.2% of the white voters supported Rev. Joseph N. Green, Jr.

in his first election. In 1982, Rev. Green received the support of 31.1% of the white electorate. In 1984, Rev. John Foster was supported by 26.6% of the white voters. These figures show a willingness by white voters to cross racial lines when voting in City Council elections. The Court also notes that a substantial number of black voters have shown a willingness to vote for white candidates, particularly in the elections of Elizabeth Howell in 1974, 1978 and 1980, in which she received the support of a majority of black voters.

Further study of the election results reveals the importance of coalition politics in Norfolk City Council elections. Both plaintiffs' and defendants' experts agree that none of the three winning candidates in 1984 would have been elected without the support they received from both black and white voters.

The Court's review of the studies also shows that a number of unsuccessful black candidates failed to receive the support of even a majority of black voters. For example, in 1984, two black candidates, Theodore Hall and Joseph Rose, received only 8.9% and 18.7% of the votes cast by blacks, respectively. In 1982, black candidates Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were supported by only 27.5% and 29.6% of the black voters, respectively. In the 1980 election, George H. Banks, a plaintiff in this lawsuit, received only 34.5% of the votes cast by black voters. Another of the plaintiffs in this action, Dr. Milton A. Reid, received the support of only 36.4% of the blacks voting in the 1974 election. These black candidates were obviously not the candidates of choice of the black voters in those elections.

Between 1974 and 1984 there have been sixteen black candidates for the Norfolk City Council. Four of those candidates have been elected. Eight of the remaining black candidates failed to receive the support of even a majority

of the black electorate. The remaining four black candidates are actually only two individuals: Evelyn T. Butts in 1980, 1982 and 1984, and Lenious G. Bond in 1972. Mrs. Butts would most likely have been elected in 1984 had she received the same level of black support she received in her earlier races, which dropped from a high of 92.9% in 1980 to 72.1% in 1984.

The Court also finds, as the parties agree, that the current rate of black voter registration and turnout is proportionately higher than that of the white population. One would expect the opposite to be true under a racially polarized voting system with a majority of white voters. After thoroughly reviewing the voting behavior studies presented by the plaintiffs and defendants, the Court finds that the voting patterns in Norfolk City Council elections do not reflect racial polarization.

3. Efforts to Limit the Field of Candidates

The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. In the most recent election, held May 1, 1984, ten candidates sought to fill three seats on the Council. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen.

The evidence fails to disclose any effort on the part of whites to limit the field of candidates and the statistics support this conclusion. There was no evidence offered to suggest that any individual who desired to seek a position on the City Council was prevented or even dissuaded from doing so.

4. Summary

In summary, the Court finds no evidence of white back-lash. The Court further finds that a thorough examination of the voting behavior of Norfolk's black and

white voters fails to reveal a racially polarized electorate. Finally, the Court finds no evidence of efforts by whites to limit the field of candidates. Applying Dr. O'Rourke's definition of racially polarized voting, the Court concludes that voting in Norfolk City Council elections is not racially polarized.

F. Enhancing Factors

1. Existance of Unusually Large Election Districts

Under the at-large system, the election district obviously consists of the entire fifty-three square mile City. The Court is not convinced, however, that the size of the election district, that is of the City, enhances the opportunity for discrimination against black residents. Although the plaintiffs allege that it would be easier and less costly to run for the City Council under a ward system, they presented no statistical evidence to support this contention. It is conceivable that there would be no decrease in the cost of running for City Council under a ward system because head-to-head competition may in fact cause costs to escalate.

2. Majority Vote Requirements

There is no majority vote requirement in Norfolk City Council elections. Council members are elected by plurality of the votes cast, regardless of whether they have received a majority of the votes cast. In fact, in every City Council election from 1968 through 1984, the candidate with the lowest total vote of those elected has received less than 50% of the vote. Four of those candidates with the lowest winning total received less than 45% of the votes cast.

3. Anti-Single-Shot Provisions

There are no prohibitions against casting single-shot ballots in Norfolk City Council elections. In fact, the evidence shows that black voters have on occasion successfully employed single-shot tactics.

4. Staggered Terms

The members of the Norfolk City Council serve staggered four-year terms. Generally, four seats are filled in one election and three seats are filled in the following election. In two of the nine elections held since 1968, however, more than four seats were up for election. Six seats were available in 1970 and five seats were available in 1978, due to vacancies on the Council.

The plaintiffs allege that staggered terms increase the likelihood of head-to-head racial contests and minimize the effect of single-shot voting. If, as the plaintiffs allege, staggered terms have a discriminatory effect upon Norfolk's City Council elections, it would be expected that in those years in which the fewest seats were up for election blacks would be unsuccessful in seeking office. To the contrary, in four of the five elections held since 1968 in which three seats were available a black has been elected, that is, Joseph Jordan in 1968, 1972, and 1976, and Rev. John Foster in 1984.

Furthermore, the plaintiffs' allegation with regard to head-to-head contests is not supported by the evidence. The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen. The large field of candidates in Norfolk City Council elections minimizes the likelihood of head-to-head contests.

5. Numbered Post or Residency Requirements

There are no numbered post or residency requirements governing Norfolk City Council elections. A numbered post requirement, which would require candidates to seek particular seats on council, would create head-to-head contests, which the plaintiffs find objectionable. A residency

requirement, which would in effect be equivalent to a numbered post requirement, similarly would encourage head-to-head contests.

6. Summary

In summary, the Court finds that the City has not used any of the enumerated voting practices or procedures to discriminate against black voters.

G. Candidate Slating

Defense witness Dr. Timothy J. O'Rourke, a University of Virginia political scientist, defined a slating group as "a permanent or semipermanent organization who [sic] recruits candidates to run for office. Having recruited them, [it] puts them up as a slate for as many seats as are open, and organizes a campaign and promotes those candidates in a campaign as a slate." (Tr. 1961-62). As an example of slating groups, Dr. O'Rourke cited political party organizations. (Tr. 1962). The Court adopts the definition of a slating group offered by the defendants.

The plaintiffs allege that an all-white group of businessmen, referred to as the "westside businessmen's coalition" during the trial, has twice run a slate of all-white candidates and that no blacks were ever asked by the members of the group to run on its slate. The plaintiffs refer to the 1976 election in which Vincent J. Thomas and G. Conoly Phillips ran for election together and the 1980 election in which Thomas and Phillips ran with Joseph A. Leafe.

The plaintiffs implied throughout the trial that this "westside businessmen's coalition" has sufficient influence to determine who will be elected to the City Council. The plaintiffs offered no evidence, other than the testimony of the plaintiffs themselves, that this "westside businessmen's coalition" is a slating organization and the Court finds that this group does not constitute a slating organization as defined by Dr. O'Rourke. When Thomas and Phillips

ran together in 1976, although there were three seats up for election, the two candidates did not ask a third candidate to run with them. A slate, as defined by Dr. O'Rourke, consists of as many candidates as there are seats available. Accordingly, the Thomas-Phillips ticket could not constitute a slate. While Phillips and Thomas may have been asked to run by individual members of the business community, there is no evidence that they were recruited to run by a slating organization.

With regard to the 1980 election, Joseph Leafe testified that he was asked to run by then Mayor Thomas. Leafe had decided not to run again for the Virginia House of Delegates, in which he had served as a member from 1972 to 1980. Leafe stated that he did not have discussions with either Joshua Darden or Harvey Lindsey, identified during the trial by the plaintiffs as leaders of the "westside businessmen's coalition," before he decided to run. Leafe was not recruited to run by any single group; rather he was encouraged to run by voters from throughout the City. Leafe ran with Thomas and Phillips in 1980 and the three shared election expenses. They did not consider themselves to be a businessmen's slate. Leafe and Thomas were elected; Phillips was not. There is no evidence that the three candidates were recruited by a slating organization. It is more likely that the two incumbents, who had run together successfully in the 1976 election, sought a third candidate who shared their stance on the issues and who would be willing to share campaign expenses. The plaintiffs' theory, that this so-called "westside businessmen's coalition" is controlling the Norfolk City Council elections, is not supported by credible evidence.

The only possible example of slating by an organization in Norfolk City Council elections, as established by the evidence, occurred in 1982, when the City Democratic Committee endorsed a biracial slate of two black and two white candidates. The two black candidates who were members of that slate were Herbert M. Collins, a plaintiff

in this action, and James F. Gay, counsel for the plaintiffs in this action. All four of the candidates who ran on the Democratic Committee slate failed to win election.

Both the plaintiffs and defendants agree that the Concerned Citizens of Norfolk, a black political organization, has endorsed both black and white candidates for Council, but that the group is not a slating organization because it neither recruits candidates for office nor runs the endorsed candidates on a slate.

In summary, the Court finds that the only possible candidate slating by an organization which has occurred in Norfolk City Council elections occurred in 1982, when the City Democratic Committee endorsed a biracial slate of candidates. The Court further finds that the plaintiffs failed to prove the existence of a candidate slating organization which denies black candidates access to the process.

H. Socio-economic Disparities

1. Education

According to the 1980 Census, the percentage of adult blacks (25 years or older) in Norfolk with no more than an elementary school education is 31.15%, a drop of 16.18% from the figure reported in the 1970 Census. The percentage of adult blacks in Norfolk with less than four years of high school education is 55.3%, according to the 1980 Census, a drop of 18% from the 1970 figure. By way of comparison, 1980 Census figures show that 12.0% of Norfolk's adult whites have only an elementary school education, and that 29.8% of the adult white population has less than four years of high school education. Of the total adult population with four or more years of college, blacks comprised 16.48% and whites 72.2%. The 1970 figure for blacks was 12.95%, showing an increase in the number of college educated blacks.

2. Income

According to the 1980 Census statistics, 35.46% of all black persons residing in Norfolk have incomes below the poverty level, compared to 11.5% of all white persons. This figure reflects a drop of almost 4% from 1970 for black persons. The 1980 Census figures also show that the median income for Norfolk's whites is $17,548, while the median income for Norfolk's blacks is $10,258.

3. Housing

According to the 1980 Census, over 10% of all housing units occupied by blacks have more than one person per room, as compared with less than 2% of white-occupied households. The 1970 Census figures reflect a decrease in black households having more than one person per room of over 8% over the last decade. The 1980 Census figures also reflect that the median value of white owner-occupied households exceeds that of black owner-occupied households by $11,100.

4. Employment

The 1980 unemployment rate for blacks (11.9%) is more than twice that of whites (5.3%).

5. Health

The plaintiffs assert that the 1982 infant mortality rate and 1982 rate of new cases of tuberculosis in Norfolk were higher for blacks than for whites. The Court is unable to verify these figures because the plaintiffs did not indicate the source of their figures.

6. Effect of Socio-economic Disparities

Despite the disparities between the black and white citizens of Norfolk in the area of education, employment, housing and income, the voter participation figures show that they have not hindered the participation of Norfolk's blacks in the electoral process. Blacks are registering to

vote and turning out to vote at rates equal to or greater than the rate for whites, based on a percentage of the voting age population.

One longtime observer and participant in Norfolk politics, Judge Joseph A. Jordan, Jr., a black former City Council member testified that the failure of blacks to vote in Norfolk elections cannot be blamed on the economic status of blacks. He places the blame, at least in part, on the black leadership's failure to continue efforts begun in the 1950's aimed at achieving total black suffrage in Norfolk, and which were subsequently discontinued by the blacks. (Tr. 1521-23).

The Court is pleased to note that the position of Norfolk's black residents has improved in the areas of education, housing and employment in recent years. This may well be in some part due to their continued and increasing participation in the political process.

I. Racial Appeals

The plaintiffs point out only one City Council campaign that they contend was characterized by appeals to the racial prejudices of white voters. The plaintiffs allege, and their expert Dr. Jerry Himelstein, a sociologist, testified, that the 1982 campaign was characterized by subtle and overt racial appeals. Dr. Himelstein's conclusion was based solely on a study of newspaper accounts of the 1982 campaign during the four months preceding the election. He testified that the two dominant themes which emerged were public school busing as a racial issue and the issue of black representation on the City Council.

Dr. Himelstein testified that his opinion that the school busing issue constituted a racial appeal was confirmed by an examination of the Brace report's 1982 election statistics and by a letter from former Lieutenant Governor Henry E. Howell, Jr. to then Mayor Vincent Thomas, which appeared in *The Virginian-Pilot*. Dr. Himelstein suggested

that the issue of busing effected the outcome of the election because the three white candidates who were elected, Dr. Mason C. Andrews, Claude J. Staylor, Jr. and Robert E. Summers, all opposed busing. The Court believes, however, that the election of these three candidates can as easily be attributed to their incumbency, and that Dr. Himelstein's suggestion that they were elected because of their opposition to busing is unsubstantiated.

Dr. Himelstein's other so-called confirmation of his analysis, the Howell letter to Thomas, is equally lacking in validity. Howell testified that his letter, in which he urged Thomas to reconsider his opposition to busing, "didn't have anything to do with the campaign." (Tr. 1584). Howell further testified that he never heard any discussions of busing by candidates during the 1982 election that he would characterize as racial appeals.

The Court concludes from the evidence that the issue of public school busing was a legitimate public concern and not an appeal to racial prejudices. Both black and white candidates addressed the issue of busing during the 1982 campaign, although many of the candidates spoke to the issue reluctantly and often only when questioned by the public about their stance on the issue. The evidence fails to show that any of the candidates intended to, or did in fact, use the issue to appeal to the racial prejudice of voters.

Dr. Himelstein also testified that news accounts of the 1982 campaign frequently discussed the race of the candidates and raised the issue of black representation on the Council. It appears to the Court, from reading the newspaper accounts, that this issue was one raised by the black candidates. There was no evidence that this issue constituted an appeal to the racial prejudice of voters.

The Court concludes that the evidence fails to show that the 1982 campaign was characterized by subtle or overt racial appeals. In fact, Rev. Joseph N. Green, Jr., a black

member of the Council, was reelected in the 1982 election with the support of over 30% of the white voters. The statistics indicate that Rev. Green received approximately the same support from white voters in 1982 as he received in the 1978 election, indicating no withdrawal of white support from Rev. Green, who favored school busing. The plaintiffs do not suggest that racial appeals were made in any other City Council election.

J. Election of Blacks to Public Office

Blacks currently hold elective positions on the Norfolk City Council, in Norfolk's delegation to the Virginia House of Delegates, and as the sheriff of the City of Norfolk. Two blacks, Revs. Joseph N. Green, Jr. and John Foster, currently serve on the seven-member City Council. Two blacks, William P. Robinson, Jr. and Dr. Yvonne Miller, are members of Norfolk's five-member delegation to the Virginia House of Delegates. The sheriff of the City of Norfolk is David Mapp, a black.

Since at-large elections were instituted in 1918, three blacks have been elected to membership on the Norfolk City Council. At least one black has served on the Council continuously since 1968. Joseph A. Jordan, Jr., a black, was first elected to the City Council in 1968 and was reelected in 1972 and 1976. He served as vice mayor during his last two terms, a position to which he was elected by the members of the Council. Following Jordan's appointment to a judicial position in 1977, Rev. Joseph N. Green, Jr., a black, was appointed to fill Judge Jordan's unexpired term. Rev. Green was elected to the Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. Rev. John Foster, a black, was elected to the City Council on May 1, 1984.

As a result of Rev. Foster's election, two blacks, Revs. Green and Foster, will serve on the seven-member Council through June 30, 1986. The plaintiffs insinuated through-

out the trial that the election of Rev. Foster to the Council, which occurred after the filing of this lawsuit, was an attempt by unnamed white city officials and other community leaders to moot this action. The plaintiffs point to former Mayor Vincent Thomas' decision to forgo seeking reelection in 1984, and suggest that his decision was part of this alleged conspiracy. Mayor Thomas stated that he decided not to seek reelection in 1984 for personal reasons. He further stated that his support for the election of a second black to Council predated the filing of this action and the Court is not persuaded to the contrary by the plaintiffs' innuendo. There is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action.

Norfolk's delegation to the Virginia House of Delegates has included at least one black member since 1969, when William P. Robinson, Sr. was first elected. Robinson, Sr. served in the House of Delegates until his death in 1981. Following his death, his son, William P. Robinson, Jr., was elected a member of Norfolk's delegation to the House of Delegates and he remains a member, having been reelected in 1983. In 1982, Norfolk was divided into single-member districts for the election of members of the House of Delegates, those elections having previously been conducted at-large. In the 1982 special election, the first conducted under the single-member districts plan, Robert Washington, a white, defeated William Swindell, a black and a plaintiff in this lawsuit, in a head-to-head race to represent the newly created 89th District, a predominently black district. In 1983, Delegate Washington declined to seek reelection, and Dr. Yvonne Miller, a black, ran unopposed for election to the House of Delegates from the 89th District. Consequently, two of the five current members of Norfolk's delegation to the Virginia House of Delegates are black, Delegates Miller and Robinson.

David Mapp became the first black elected to a constitutional office in Norfolk when he was elected sheriff in

1981. In the primary election, Sheriff Mapp defeated a white challenger in a head-to-head contest. In the general election he overwhelmingly defeated three white candidates. Sheriff Mapp received the endorsements of the outgoing sheriff, a white, and the Democratic party.

K. Responsiveness

1. Appointments to Boards and Commissions

The plaintiffs contend, and their expert Dr. Loren Solnick, a labor economist, testified, that black residents are underrepresented on Norfolk's appointive boards and commissions. The parties have stipulated to the racial composition of the 58 boards, commissions and authorities appointed in whole or in part by the Norfolk City Council. Of the 438 appointive positions, 344, or 78.54%, are filled by white residents and 94, or 21.46%, are filled by black residents. Seventeen of the boards and commissions are all-white, including the Granby Mall Advisory Commission, the Municipal Bond Commission, the Police-Fire Trial Board, and the Tidewater Community College Board. One of the boards, the Southeastern Tidewater Opportunity Project Board of Directors, is all-black. Two of the boards and commissions have a majority black membership and an additional two have an equal number of black and white members.

These figures, taken alone, would suggest, as Dr. Solnick testified his study shows, that blacks are indeed underrepresented on the City's appointive boards and commissions, considering that blacks constitute 31.48% of Norfolk's voting age population and only 21.46% of the appointive positions are held by blacks. The defendants presented evidence, however, in the form of City ordinances, which shows that in order for a citizen to serve on certain boards and commissions he or she may be required to meet certain criteria. Such criteria include special knowledge, experience, training or education in the relevant field.

In addition, some of the members of certain commissions and boards are required to be representatives of particular groups or sectors of the community. For example, City Code Section 31.47 provides that the five members of the Granby Mall Advisory Commission shall consist of: one representative of the Norfolk Redevelopment and Housing Authority, one representative of the Downtown Norfolk Association, one representative of the Norfolk Chamber of Commerce, one representative of the Retail Merchants Association, and one representative of downtown business interests. Over seventy-five of the seats on boards and commissions carry with them special qualifications as contained in the City ordinances.

The plaintiffs' expert, Dr. Solnick, assumed in his study that every person in the voting age population is eligible to serve on the boards or commissions. This is obviously a flawed assumption, as demonstrated by the evidence offered by the defendants. When confronted with the defendants' evidence, Dr. Solnick admitted that he failed to consider these special requirements in his study. The plaintiffs failed to respond with any more accurate figures, which would take into account the special qualifications needed to serve on many of the boards and commissions, despite having the opportunity to do so on rebuttal. The plaintiffs having failed to present an accurate study upon which the Court could base an evaluation, the Court is unable to find that the City has failed to appoint blacks to boards and commissions in proportion to their representation in the voting age population of the City. The Court notes, however, that blacks are well-represented on the more important boards and commissions, such as the School Board, the Norfolk Redevelopment and Housing Authority Board of Commissioners, the City Planning Commission, and the Civil Service Commission.

2. City Employment

The plaintiffs contend, and their expert Dr. Loren Solnick testified, that his study shows that blacks are under-

represented in City government supervisory positions, as well as in the Norfolk Police and Fire Departments. The parties have stipulated that as a percentage of total municipal employment, blacks comprised 36.16% of the municipal work force in 1973 and 41.31% of the work force in 1983. According to the City's 1983 EEO-4 report, as amended, the percentage of black city employees in each of the following job categories was:

Officials/Administrators	5.5 %
Protective Services	10.02%
Professionals	31.77%
Paraprofessionals	60.28%
Technicians	23.11%
Office/Clerical	39.48%
Skilled Craft Workers	42.11%
Service Maintenance	81.74%

In Dr. Solnick's study he compared the City's employment of blacks in these eight occupational categories with the 1980 Census data for the Norfolk SMSA, specifically the employment of blacks and whites in comparable occupational groups. The plaintiffs allege, based on Dr. Solnick's study, that blacks are particularly underrepresented in the officials/administrators and protective services categories. The plaintiffs' study found no underrepresentation of city employees in the remaining six categories: professionals, paraprofessionals, technicians, office/clerical, skilled craft workers and service maintenance.

With regard to officials and administrators, Dr. Solnick's comparison included figures from the 1980 SMSA Census tables for public officials and administrators at the federal, state and local levels. The Court agrees with the defendants that the more appropriate comparative group would be

limited to officials and administrators employed at the local level. Using that group as the comparison, the difference between the City's black officials and administrators (5.5%) and the figure drawn from the Census tables (6.5%) is insignificant.

With regard to protective services employees, a category which in the City of Norfolk is limited to police and firefighters, the Court points out that the City's hiring in the Police and Fire Departments has been controlled by a consent decree entered by another Judge of this Court in the case of *United States* v. *City of Norfolk*, Civil Action No. 78-418-N (E.D. Va. Aug. 28, 1978). The evidence shows efforts by the City to recruit black applicants for positions in the Police and Fire Departments. In addition, the percentage of blacks in the City's Police and Fire Departments does not differ significantly from the 1980 SMSA Census figures for blacks employed in police and firefighting occupations.

The Court notes that the plaintiffs did not present any evidence of qualified black applicants being turned down for City employment.

3. Libraries

The parties have stipulated that both in terms of location of libraries and programs offered, the Norfolk City Libraries Department does not discriminate against black citizens and is responsive to the needs of black citizens.

4. Fire Department Services

The parties have stipulated that both in terms of locations of fire stations and responses to fire alarms, the Norfolk Fire Department does not discriminate against Norfolk's black citizens and is responsive to the needs of black citizens.

5. Police Department Services

The plaintiffs offered little evidence of discrimination by the Norfolk Police Department against black citizens. The

Court finds on the basis of the evidence offered by the defendants that the Police Department has undertaken a series of community relations efforts designed to improve its relations with the black community. These efforts include the establishment of a Police Community Relations Unit, the maintenance of storefront operations in black neighborhoods, and the creation of the Block Security and Comprehensive Crime Prevention programs. The Court further finds that the Police Department is responsive to the needs of black citizens.

6. Social Services

The parties have stipulated that in terms of location of facilities and services provided, the Norfolk Department of Human Resources does not discriminate against black citizens and is responsive to the needs of Norfolk's black citizens. The defendants' evidence shows that the City offers a variety of social service and public assistance programs which have primarily benefitted black residents.

7. Health Services

The plaintiffs offered no evidence that the Norfolk Department of Health discriminates against black citizens or is unresponsive to their needs. The Court finds, on the basis of the evidence offered by the defendants, that the City offers numerous health programs which have primarily benefitted black residents.

8. Parks and Recreation

The plaintiffs offered no evidence that the Department of Parks and Recreation is unresponsive to the needs of black citizens. The evidence offered by the defendants shows that City's recreational facilities and services are utilized by black residents at a greater rate than that of white residents.

9. Cemeteries

The plaintiffs offered no evidence that the City's cemeteries are operated in a discriminatory manner, and the

Court finds that the defendants have demonstrated that the City's eight cemeteries are operated on a nondiscriminatory basis.

10. Education

The plaintiffs attempted on several occasions to raise the issue of public school busing in this case. The Court declined to permit them to do so. The Court refers the parties to Judge MacKenzie's opinion in *Riddick* v. *School Board of City of Norfolk*, Civil No. 83-326-N (E.D. Va. July 9, 1984). The plaintiffs have failed to establish any discrimination against black students in the Norfolk public school system. In fact, the Superintendent of Schools is black.

11. Public Works and Utilities

The plaintiffs presented little evidence of a lack of responsiveness by the Department of Public Works to the needs of black residents. The Court finds on the basis of the evidence offered by the defendants that the Department of Public Works provides street lighting, paved roads, drainage, solid waste removal and street cleaning to all parts of the City on a nondiscriminatory basis and is responsive to the needs of black residents. The plaintiffs offered no evidence that the Department of Public Utilities discriminates in its provision of water and sewer services to the City's residents, and the Court finds no such discrimination.

The Court finds that since 1970, the City has expended millions of dollars on capital improvement projects in predominantly black neighborhoods. The parties agree that from 1970 through September, 1983, the City of Norfolk spent over $9.3 million in Berkley, a predominantly black-occupied area of Norfolk, and allocated an additional $3.5 million to be spent. The funds were spent on capital projects including street repairs, a senior citizen center, branch library replacement, fire station replacement and neigh-

borhood facilities program. Of the funds already spent, approximately $6.5 million was federally funded and $2.5 million was locally funded. Of the funds yet to be spent, $.5 million will be federally funded and $3 million will be locally funded.

The parties also agree that from 1969 through October, 1983, the City has spent over $19 million in the Church Street/Huntersville area, another predominantly black-occupied area of Norfolk, with an additional $4.9 million allocated to be spent. The funds were spent on capital improvement projects including street repairs, cemetery repairs, day care center acquisition, and rehabilitation to Young Park, a subsidized housing project. Of the over $19 million already spent, $17.5 million was federally funded and $1.7 million was locally funded. Of the $4.9 million yet to be spent, $4.8 million will be federally funded and $1 million will be locally funded.

12. Housing

a. Code Enforcement

The plaintiffs presented no evidence of discriminatory enforcement of the City Housing Code by the Department of Community Improvement or the Division of Housing Services. The Court is persuaded by the evidence offered by the defendants that the Department of Community Improvement and the Division of Housing are responsive to the needs of black residents, and that many of the programs offered are designed to benefit the City's black citizens.

b. Urban Redevelopment

The plaintiffs contend that the Norfolk Redevelopment and Housing Authority (NRHA) has not been responsive to the needs of black residents. The NRHA was established by the City in 1940, pursuant to State enabling legislation. The Norfolk City Council appoints the NRHA Board of Commissioners. The plaintiffs point out, and the defendants

concede, that of the 21 commissioners who have served on the NRHA since 1940, only three have been black. Two of the five current commissioners, however, are black. The NRHA's main functions are the prevention and removal of slums and blight and the provision of low- and moderate-income housing in Norfolk.

The plaintiffs have alleged that the NRHA has not replaced low-income housing which was demolished through slum clearance programs with other low-income housing on a one-to-one basis. David H. Rice, executive director of the NRHA, testified that this allegation is factually incorrect, and that in fact, the number of low-income housing units which were made available exceeds the number of low-income units which were demolished. According to NRHA figures, during the period from 1950 to the date of trial, the NRHA was responsible for the demolition of 10,900 low-income housing units as part of its slum clearance and urban renewal efforts. During the same time period, NRHA figures indicate that the NRHA was responsible for the production of 9,615 new low-income housing units, made available an additional 552 units under a federally subsidized housing program known as "Section 8," and rehabilitated 74 units using Section 8 funds. In addition, the NRHA, under its own conservation program, rehabilitated another 3,000 units by improving their condition from "substandard" to "standard." Totaling these figures, it appears that the NRHA has made available for occupancy 13,241 low-income housing units during the period from 1950 to the date of trial, over 2,300 more than were demolished during the same period.

These figures, which the Court finds to be credible, rebut the plaintiffs' allegation that the NRHA has not replaced low-income housing on a one-to-one basis. The Court further finds that all persons displaced by NRHA programs are required by NRHA procedures to be relocated into "decent, safe and sanitary housing," and that these procedures have been complied with. (Tr. 1739, 1741).

c. East Ghent

The plaintiffs rely upon the redevelopment of East Ghent to bolster their claim that the NRHA's policies and programs are racially discriminatory. Both parties agree that prior to redevelopment, East Ghent was a severely rundown predominantly black neighborhood. According to NRHA executive director Rice, approximately 1,800 families, almost all of whom were black, were relocated as a result of the East Ghent redevelopment project. The plaintiffs contend that those who were relocated were given indications that they would be able to return to East Ghent when redevelopment was completed. Mr. Rice concedes that in the early stages of the redevelopment project, indications were made that the NRHA would include some subsidized housing in its plans for East Ghent.

A 150-unit federally subsidized housing project for the elderly was the first housing built in East Ghent. In 1974, the NRHA Board of Commissioners made a decision not to locate any additional low-income housing projects in East Ghent. This decision was based upon a desire to attract middle-income families back into the City's downtown area to provide a much needed tax base. Other considerations included the fact that the federal programs that provided subsidies for privately owned housing had been halted in 1974. The City Council approved the NRHA's application to rezone the East Ghent area from R-4 (Multiple Residence District), R-5 (Multiple Residence District), C-1 (Neighborhood Commercial District), C-3 (General Commercial District) and M-1 (Limited Manufacturing District) to PD-H (Planned Development District - Housing) on November 5, 1974 by a 6-1 vote. According to Carroll A. Mason, who was then Area Director of the United States Department of Housing and Urban Development, HUD agreed with the City's assessment of the need to broaden its tax base.

The Court concludes that the NRHA's decision to promote middle-income housing in East Ghent was not racially motivated, but rather was motivated by a genuine desire to broaden the City's downtown tax base. In addition, the Court finds that the NRHA's decision was consistent with the City's efforts to revitalize its downtown area.

d. Community Development Block Grant Programs

Since the mid-1970's, the City has participated in Community Development Block Grant (CDBG) programs administered by the United States Department of Housing and Urban Development (HUD). The CDBG program provides federal funds for such purposes as programs benefitting low- and moderate-income persons. During the years of its participation in the CDBG programs, the City has received nearly $100 million in federal funds.

The plaintiffs have alleged that the NRHA has repeatedly violated federal statutes and regulations with regard to achieving racial balance in public housing projects. The defendants contend that the City's funds have never been reduced, delayed, suspended, or disapproved by the Federal government for any reason, including any violation of federal statutes or HUD regulations. The Court has thoroughly reviewed the testimony and the documentary evidence on both sides. The Court accepts as credible the testimony of past and present NRHA officials that they have had little success in their attempts to achieve racial balance in the City's public housing projects because: (1) HUD regulations require that preference for placement in projects be given to those who have been displaced, and those Norfolk residents who have been displaced are overwhelmingly black; (2) HUD prohibits the use of quotas or preferential treatment on the basis of race to ensure racial balance; and (3) those who seek public housing in Norfolk are predominantly black. The NRHA officials' testimony is supported by the testimony of Carroll Mason,

former Area Manager of HUD. The Court finds that it would be impossible for the City to achieve racial balance in its housing projects when it does not have enough white applicants to achieve that goal.

e. Racial Integration of Neighborhoods

The plaintiffs allege that the City of Norfolk is racially segregated, in large part due to the NRHA's placement of public housing projects in predominantly black neighborhoods. The defendants contend that this is not so, citing the testimony of urban demographer Dr. William A. Clark that Norfolk is "a reasonably well integrated city." (*Riddick*, Tr. 3069). The defendants further rely on Dr. Clark's studies to show that even a random allocation of the City's public housing projects would have had only a minor impact on the racial makeup of the City's neighborhoods. The Court finds no evidence to the contrary and therefore concludes that the plaintiffs have failed to substantiate this claim.

13. Summary

The Court finds evidence of substantial black-employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black occupied areas, and a nondiscriminatory provision of essential city services and capital improvements to black residential neighborhoods.

L. Tenuousness of Policies Supporting At-Large Elections

The plaintiffs suggest that the use of an at-large election system in Norfolk is pursuant to a tenuous policy. The Court finds, to the contrary, that the policy is by no means tenuous.

As defendants' expert, Dr. Timothy J. O'Rourke, testified, the city manager-council form of government is associated with the at-large election system throughout the

nation. According to a 1981 survey, of the cities nationwide with populations of between 250,000 and 500,000 which have council-manager forms of government, over 75% have at-large elections for council.

All of Virginia's forty-one cities have the council-manager form of government. Only six of those cities do not have at-large elections for council. The cities of Petersburg, Richmond and Lynchburg abandoned at-large elections after Justice Department objections to proposed annexations under Section 5 of the Voting Rights Act. Suffolk's abandonment of the at-large system dates to a city-county consolidation. Hopewell abandoned at-large elections in settlement of a Section 2 action. Winchester, Lynchburg and Hopewell have adopted systems in which some council members are elected from wards and some at-large. The remaining thirty-five Virginia cities have at-large elections.

The Court concludes that Norfolk's policy of at-large City Council elections is consistent with both national and State practices for cities with the council-manager form of government. The Court finds no evidence that Norfolk's at-large election system is the product of a tenuous policy.

M. Black Participation in the Electoral Process in Norfolk

The extent of black participation in Norfolk's elections is best illustrated by an examination of the role which the Concerned Citizens of Norfolk, a black political organization, has played, as well as an examination of the participation of blacks in the City Democratic Party.

1. The Concerned Citizens of Norfolk

Founded in the 1960's, the Concerned Citizens has become the most influential black political organization in Norfolk. The original co-directors of the group were Joseph A. Jordan, Jr. and Dr. William P. Robinson, Sr., both black residents of Norfolk. Dr. Robinson served as a member of

the City's delegation to the Virginia House of Delegates from 1969 until his death in 1981. Joseph A. Jordan, Jr. served on the City Council from 1968 until 1977 and served as vice mayor from 1972 to 1976. He was appointed to a judgeship on the General District Court in 1977. Both were elected repeatedly in at-large elections. Today, the co-directors of the Concerned Citizens are William P. Robinson, Jr., a member of Norfolk's delegation to the Virginia House of Delegates since 1981, and Mrs. Evelyn T. Butts, who has unsuccessfully sought a seat on the City Council three times.

Prior to each election in Norfolk, a committee of the Concerned Citizens interviews the candidates who are seeking the organization's endorsement. The group's endorsements are presented primarily through the issuance of the Goldenrod guide ballot, which lists the names of the endorsed candidates. The guide ballot is widely distributed on election day.

The effectiveness of the Concerned Citizens' endorsements in garnering the votes of black citizens for the endorsed candidates can be seen from a review of several City Council elections. In 1974, for example, the Concerned Citizens endorsed two white candidates, Elizabeth Howell, wife of former Lieutenant Governor Henry E. Howell, Jr., and Claude J. Staylor, Jr., former Norfolk Chief of Police. The organization also endorsed a black candidate, Lenious G. Bond. Three other black candidates were amongst the field of twenty-one candidates, including Dr. Milton A. Reid, a plaintiff in this action. Dr. Reid sought, but did not receive, the Concerned Citizens' endorsement. Mrs. Howell received over 58% of the black vote[6] and Mr. Staylor received over 56% of the black vote and both were elected. Mr. Bond received 73% of the black vote, while Dr. Reid received only 36% of the black vote.

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[6] The figures in this section are all based on homogeneous precinct analysis.

In 1980, the Concerned Citizens again endorsed Mrs. Howell. The organization also endorsed one black candidate, Mrs. Evelyn T. Butts, the co-director of the group. The only other black candidate in the field of twelve was George H. Banks, a plaintiff in this lawsuit. Mr. Banks was not endorsed by the Concerned Citizens, and received only 34.5% of the black vote. The endorsed candidates, Mrs. Howell and Mrs. Butts, received 72.9% and 92.9% of the black vote, respectively.

In the 1982 election, there were four black candidates in the field of fourteen. The Concerned Citizens endorsed two of the black candidates, Rev. Joseph N. Green, Jr. and Mrs. Butts. The two other black candidates, Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were not endorsed. Mr. Collins and Mr. Gay each received less than one-third of the black vote, whereas Rev. Green and Mrs. Butts each received over 87% of the black vote.

The Concerned Citizens endorsed two black candidates, Rev. John Foster and Mrs. Butts, and one white candidate, Joseph Leafe, in the 1984 election. Two black candidates who ran without the Concerned Citizens' endorsement, Theodore Hall and Joseph Rose, received 8.9% and 18.7% of the black vote, respectively. Mr. Leafe, who received only 1.7% of the black vote in 1980 when he ran without the Concerned Citizens endorsement, received 19.6% of the black vote in 1984, more than either Hall or Rose. Mrs. Butts received 72.1% of the black vote and Rev. Foster received 79.9%.

The plaintiffs have acknowledged the effectiveness of the Concerned Citizens' endorsements. In addition, the group's effectiveness is demonstrated by their success rate. From 1978 through 1984, the Concerned Citizens has endorsed twenty-one candidates, both black and white, for the Norfolk City Council. Thirteen of those candidates, five black and eight white, have been elected. From 1970 to

the present, the City Council has included at least two, and sometimes three, members who were endorsed by the Concerned Citizens, and who received a majority of the black vote. Six of the seven current Council members were endorsed by the Concerned Citizens in at least one of their campaigns.[7]

2. The City Democratic Party

The parties agree that Norfolk's black citizens generally support Democratic candidates in partisan elections. Approximately 31% of the Norfolk City Democratic Committee members are black. Two of the Committee's six officers, the first vice-chairman and the treasurer, are black.

There have been close ties, historically, between the black members of the City Democratic Committee and the leaders of the Concerned Citizens of Norfolk. In 1981 and 1982, however, a rift occurred in the City Democratic Committee which was related to the 1982 City Council campaign and involved several of the plaintiffs in this action.

In the fall of 1981, an election of precinct committee members was scheduled, but Party Chairman William P. Williams failed to notify Mrs. Butts, co-director of the Concerned Citizens, of the filing deadlines, as had been done customarily by past party chairmen. As a result, many persons who had previously served as precinct committee members missed the filing deadline and consequently were replaced. Approximately one-half of the precinct committee members were replaced by new precinct committee members. Herbert M. Collins, a plaintiff in this action, was among the new precinct committeemen. Mrs. Butts challenged the election in a December, 1981

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[7] The Council members and their year/s of endorsement are as follows: Dr. Mason C. Andrews (1978), Rev. John Foster (1984), Rev. Joseph N. Green, Jr. (1978, 1982), Elizabeth Howell (1974, 1978, 1980), Joseph Leafe (1984) and Claude J. Staylor, Jr. (1974).

meeting of the Committee, charging that it should be voided for failure to provide proper notice.

In the spring of 1982, the newly constituted City Democratic Committee endorsed four of its members for City Council seats, this being the first time the Democratic Committee had ever endorsed City Council candidates. The Democratic ticket consisted of William P. Williams, party chairman, James F. Gay, counsel for the plaintiffs in this action, Herbert M. Collins, a plaintiff in this lawsuit, and Carolyn Papafil. Gay and Collins are black, while Papafil and Williams are white.

The Concerned Citizens endorsed Rev. Green and Mrs. Butts in the 1982 race, while plaintiff Dr. Milton Reid, publisher of the *Journal and Guide* newspaper, endorsed Collins and Gay. There was animosity between the Concerned Citizens and supporters of the Democratic ticket during the campaign. Rev. Green and Mrs. Butts each received over 87% of the black vote, while Gay and Collins each received less than one-third of the black vote.

In September, 1982, a petition was filed with the Second District Democratic Committee seeking new elections to the City Democratic Committee. An adversary hearing was eventually held before a representative of the State Democratic Party, in which James F. Gay, counsel for the plaintiffs in this action, represented the then current members of the City Committee and Delegate William P. Robinson, Jr., represented the then former Committee members. The hearing officer recommended that new elections be held.

The City Democratic Committee did not hold new elections, despite the hearing officer's recommendation. In 1983, the members of the Committee who had been displaced in 1981 organized a mass meeting of Norfolk's Democrats and elected new Committee members in an at-large election. According to Delegate Robinson, the decision to

hold the mass meeting was "purely politics," without any racial connotations. (Tr. 1687).

Included amongst those precinct committee members who lost their positions at the 1983 mass meeting were plaintiffs Herbert M. Collins, Dr. H. Marks S. Richard, Barbara C. Parham and counsel for the plaintiffs, James F. Gay. Subsequently, Mr. Gay filed a complaint with the Department of Justice, complaining about the reorganization of the City Democratic Committee. The Justice Department ultimately concluded that it did not have jurisdiction of the matter under Section 5 of the Voting Rights Act.

3. Summary

The Court concludes that blacks have played an active role in the City's political processes, particularly through the Concerned Citizens and the City Democratic Committee. Moreover, at least one black candidate has run in every City Council election since 1964. The Court concurs with the opinions expressed by Mrs. Evelyn T. Butts, Lt. Gov. Henry E. Howell, Jr., Judge Joseph A. Jordan, Jr., Delegate William P. Robinson, Jr., and former Delegate Robert Washington, all leading politicians, that blacks have the opportunity to participate in the City's electoral processes equally with whites, and have in fact done so. All of these long-time observers of, and participants in, City politics favor retention of the at-large electoral system. The Court gives their opinions great weight.

While the defendants contend that this lawsuit is in reality a case of the "ins" versus the "outs," as a result of past confrontations between the plaintiffs and the Concerned Citizens of Norfolk over endorsements and control of the City Democratic Committee, the Court finds it unnecessary in deciding the issues in this action to enter such a thicket or to make such a finding.

III. CONCLUSIONS OF LAW

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1973j(f).

Having already set forth the applicable law earlier in this opinion, the Court will now consider the plaintiffs' statutory and constitutional claims.

A. Statutory Claim Under Section 2 of the Voting Rights Act

1. The Objective Factors

a. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

The law is clear that the existence of past discrimination in the areas of registration, voting and political participation is significant only if it can be shown to have lingering effects on the ability of blacks to participate in the democratic process today. *See Zimmer* v. *McKeithen*, 485 F.2d at 1305-06; *see also United States* v. *Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984). The Court has found that although there is a past history of official discrimination in Virginia effecting the right of blacks to participate in the electoral process, there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today. Norfolk's black citizens register to vote and turn out to vote at rates equal to or greater than that of Norfolk's white citizens when measured as a percentage of voting age population.[8] At least one black candidate has

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[8] Contrast this to the findings of the three judge court in *Gingles* v. *Edmisten*, No. 81-803-CIV-5 (E.D.N.C. January 27, 1984). In that case, the court found a substantial disparity of 14% between black and white voter registration rates, with whites registering at the greater rate. Slip op. at 29.

run in every Norfolk City Council election since 1964. Blacks also participate in the political process through the Concerned Citizens of Norfolk and the City Democratic Party. The plaintiffs have failed to prove that the past history of official discrimination in Virginia with regard to black participation in the electoral process has left any lingering effects on the ability of Norfolk's black citizens to participate in the electoral process today.

b. The extent to which voting in the elections of the state or political subdivision is racially polarized.

The Court has adopted the definition of racial polarization offered by the defendants' expert Dr. O'Rourke as one which is supported by common sense, as well as the law. *See, e.g., United States* v. *Dallas County Commission*, 548 F. Supp. 875, 887 (S.D. Ala. 1982) (considering white backlash in addition to voting patterns). The Court has found few courts which have actually considered what is an appropriate definition of "racially polarized voting." Courts have, however, looked beyond the statistics offered by the parties, as this Court has done, in determining whether an electorate is racially polarized. *See, e.g., Terrazas* v. *Clements*, 581 F. Supp. 1329, 1353 (N.D. Tex. 1984) (considering financing, endorsements, and incumbency). The Court concludes that under the definition of racially polarized voting which it has adopted, the Norfolk electorate is not racially polarized.

c. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

(i.) Unusually Large Election Districts

Unusually large election districts are considered to have discriminatory effects because they may make it "more dif-

ficult for blacks to get to polling places or to campaign for office." *Rogers* v. *Lodge*, 458 U.S. 613, 627 (1982). In that case, the Supreme Court was considering an election district consisting of Burke County, Georgia, which was 831 square miles, the equivalent of two-thirds of the State of Rhode Island. *Id.* In comparison, Norfolk is only fifty-three square miles. The Court has found that Norfolk is not an unusually large election district and therefore this so-called enhancing factor does not apply.

(ii.) Majority Vote Requirements, Anti-Single-Shot Provisions or Numbered Post Provisions

A majority vote requirement may impede the ability of black candidates to win in a city in which they constitute a minority of the population. *See Gingles* v. *Edmisten*, slip. op. at 37. There is no majority vote requirement in Norfolk's electoral system.

An anti-single-shot provision may disadvantage minority voters because it "may force them to vote for nonminority candidates." *Nevett* v. *Sides*, 571 F.2d 209, 217 n.10 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). There is no anti-single-shot rule governing Norfolk City Council elections.

A numbered post provision may disadvantage minority voters "by causing minority candidates to run in head-to-head contests against majority candidates." *Id.* There is no numbered post provision in Norfolk's electoral system.

(iii.) Staggered Terms

Staggered terms are considered to be a discriminatory device because they are thought to create more head-to-head racial contests. *See City of Rome* v. *United States*, 446 U.S. 156, 185 n.21 (1980); *Jones* v. *City of Lubbock*, 727 F.2d 364, 383 (1984). The Court has found, however, that this does not occur in Norfolk City Council elections because of the large field of candidates in every election.

(iv.) Lack of a District Residency Requirement

The courts are divided on the issue of whether district residency requirements enhance or weaken black voting strength. *Compare Rogers* v. *Lodge*, 458 U.S. at 627 (lack of district residency requirement enhances discrimination) *with Perkins* v. *City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982) (ward residency requirement enhances discrimination), *aff'd*, 459 U.S. 801 (1982). The lack of a ward residency requirement has not been shown by the evidence to enhance the opportunity for discrimination in Norfolk City Council elections.

(v.) Summary

The Court concludes that Norfolk's electoral system is free of any devices which enhance the opportunity for discrimination against the City's black citizens.

d. If there is a candidate slating process, whether the members of the minority group have been denied access to that process.

White v. *Regester*, 412 U.S. 755, 766-67 (1973), and its progeny clarify what is meant by this factor. *See, e.g., McIntosh County Branch of the NAACP* v. *City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979). What the courts are concerned about is whether a small group of whites, acting as a formal or informal slating organization, effectively limits the ability of blacks to seek electoral office by excluding black candidates from its slating process. *See id.* The courts have considered to be relevant evidence that potential black candidates have been deterred from seeking electoral office because of fears of economic or other forms of reprisals from the members of the white slating group. *See id.*

The Court has found that there is no group of white Norfolk citizens who, acting as a formal or informal slating organization, controls access to the ballot. Moreover, the plaintiffs presented no evidence that any potential black

candidate had ever been dissuaded from seeking election by fear of reprisals from any members of the white community. The Court has found that the plaintiffs' contention that a white westside businessmen's coalition acted as a slating organization in the 1976 and 1980 elections is not supported by the evidence. The Court has further found that the only possible instance of slating which has occurred in Norfolk City Council elections was the City Democratic Party's support of a biracial ticket of four candidates in the 1982 election. The Court concludes that there is no candidate slating process in Norfolk and therefore Norfolk's black citizens have not been denied access to such a process.

e. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

Congress explained its interpretation of this factor as follows:

> The Courts have recognized that disproportionate educational[,] employment, income level[,] and living conditions arising from past discrimination tend to depress minority political participation .... Where these conditions are shown, *and where the level of black participation is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.114, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207 (emphasis added); *see Major* v. *Treen*, 574 F. Supp. 325, 351 n.31 (E.D. La. 1983). In other words, if the socio-economic statistics show a disparity between black and white residents

and the level of black political participation is less than that of whites, the plaintiffs need not show a causal nexus between the two conditions. *See United States* v. *Marengo County Commission*, 731 F.2d at 1569.

In the present case, the Court has found a disparity between Norfolk's black and white citizens based upon the socio-economic statistics in such areas as education, income, and housing conditions. The Court has found, however, that the level of black political participation in Norfolk is equal to or greater than that of the City's white citizens, as measured by voter registration and voter turnout based upon a percentage of the voting age population, two measures which the courts have used to measure minority political participation. *See, e.g., id.* at 1568. The Court concludes that whatever socio-economic disparities exist between Norfolk's black and white residents, they do not hinder the ability of blacks to participate effectively in the City's political process today.

f. Whether political campaigns have been characterized by overt or subtle racial appeals.

In considering this factor, the courts have usually looked for a "general pattern of racial appeals in campaigns." *Gingles* v. *Edmisten*, slip op. at 39. In this case, the plaintiffs have alleged that only one campaign, the 1982 City Council election, was marred by racial appeals. They point primarily to the discussion of public school busing by those candidates who favored or opposed a plan by the Norfolk School Board to reduce the busing of elementary school pupils.

The Court has found that the discussion of busing during the 1982 campaign was not an appeal to racial prejudices. The issue was a matter of legitimate public concern and was raised by both black and white candidates. There was no effort by the plaintiffs to show a history or general pattern of racial appeals in Norfolk City Council elections and the Court concludes that none exists.

g. The extent to which members of the minority group have been elected to public office in the jurisdiction.

It is clear, as the Court pointed out earlier in this opinion, that no group has a constitutional right to proportional representation. *See Whitcomb* v. *Chavis*, 403 U.S. 124, 156-57 (1971); *Terrazas* v. *Clements*, 581 F. Supp. 1329, 1341 (1984). Congress explained the consideration which should be given to this factor as follows:

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote" in violation of this section. *Zimmer*, 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . Instead, we shall continue to require an independent consideration of the record." *Id.*

S. Rep. No. 417, 97th Cong.,2nd Sess. 29 n.115, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207.

The Court has conducted an independent review of the record, and contrary to the plaintiffs' claims, has found no evidence of an attempt by Norfolk's white citizens to circumvent the Constitution by manipulating the election of a "safe" minority candidate. The Court further found that a black has been elected to the City Council in every election since 1968, and that the Council currently has two black members. In addition to black membership on the Council, white candidates who have been the choice of a

majority of the black electorate have been elected to the Council consistently over the years. Moreover, the Court has found that blacks have been elected to the City's delegation to the Virginia House of Delegates and to a City constitutional office in at-large elections. The Court concludes that blacks and candidates of choice of the black community have been elected to public office in Norfolk.

h. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

While the issue of responsiveness is not a necessary part of the plaintiffs' case, the plaintiffs' have chosen to offer such evidence and the defendants have accordingly offered rebuttal evidence. *See* S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.116, 1982 U.S. Code Cong. & Ad News 177, 207. The Fourth Circuit has stated that the concept of "unresponsiveness" contemplates:

> a degree of unresponsiveness to the needs and interests of the black minority so palpable that it compels - or even fairly supports - an inference that the minority's "voting potential" has been so effectively "cancelled out" that its residual "political strength" is presently being disregarded with confident impunity by the city's governing body.

Washington v. *Finlay*, 664 F.2d 913, 923 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). In that case, the Fourth Circuit upheld the district court's finding that the city had been responsive, stating:

> Support for this ultimate finding was found in employment figures showing substantial black employment in city jobs, in significant though concededly not proportional black representation in appointive offices and supervisory positions, in

> the heavy allocation of federal block grant development funds to the black community, and in the substantially equal provision of essential services and improvements to black residential neighborhoods.

Id. at 922.

The Court concludes that the plaintiffs raised a number of issues with regard to responsiveness, but that the evidence offered by the defendants rebuts the plaintiffs' allegations of unresponsiveness. The Court has found evidence of substantial black employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black-occupied areas, and a nondiscriminatory provision of essential City services and capital improvements to black residential neighborhoods.

i. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The Court is to consider whether the City's use of the challenged election procedure "markedly departs from past practices or from practices elsewhere in the jurisdiction . . . ." S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.117, *reprinted in* 1982 U.S. Code Cong. & Ad. News 207. The Court has found that Norfolk's at-large system for the election of City Council members has been in effect continuously since 1918. The Court has further found that Norfolk's at-large system of electing City Council members is consistent with the practices of an overwhelming majority of Virginia's cities, as well as with the practices nationwide of cities with council-manager forms of government. The Court concludes that the policy underlying the use of the at-large system is not tenuous.

2. The Totality of the Circumstances

The Court has already established the proper legal standard to be applied in this case with regard to the Section 2 claim, that is, whether, based on the totality of circumstances, the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk, in that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The Court has considered thoroughly the lengthy testimony and extensive documentary evidence in this case. The Court concludes, based on the totality of circumstances, that the plaintiffs have failed to prove that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk. The Court is convinced that Norfolk's black citizens have an opportunity equal to that of other members of the electorate to participate in the electoral process and to elect representatives of their choice.

B. Statutory Claim Under 42 U.S.C. § 1983

The Court concludes that the plaintiffs have failed to show that any citizen has been deprived of his or her right to vote on account of his or her race as a result of Norfolk's at-large electoral system. The plaintiffs presented no evidence that, for example, a qualified black citizen was prevented from registering to vote or from actually voting.

C. Constitutional Claims

The Court has previously set out the appropriate legal standard to be applied in this case with regard to the constitutional claims, that is, whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk. Discriminatory intent need not

be proven by direct evidence, but may be "inferred from the totality of the relevant facts." *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). Furthermore, racial discrimination "need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the fourteenth and fifteenth amendments to occur." *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984); *see Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

The plaintiffs presented no direct evidence that the at-large system was adopted for a discriminatory purpose. The plaintiffs urge the Court to infer from a series of newpaper articles and advertisements which appeared just days before the referendum on the charter change in 1917 that the proponents of the at-large system had racially discriminatory motives. The Court finds exactly the opposite to be true. It was the opponents of the at-large system who injected the issue of race into the public debate over the charter change just days before the referendum. Supporters of the at-large system contended that race was not an issue and that the opponents of the charter change were trying to sway voters by injecting an irrelevant issue into the public debate. The Court concludes that the plaintiffs have failed to prove, either by direct or circumstantial evidence, that the at-large system was adopted for a racially discriminatory purpose. Likewise, the Court concludes that the at-large system has not been maintained for the purpose of discriminating against Norfolk's black citizens. In reaching these conclusions, the Court has considered all of the evidence submitted by the plaintiffs in support of their Section 2 claim.

IV. CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, the Court holds that Norfolk's at-large system for the election of City Council members does not

violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1983, or the United States Constitution. Accordingly, the Clerk is DIRECTED to enter judgment in favor of the defendants, and against the plaintiffs, on all claims.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

July 19, 1984
Norfolk, Virginia

APPENDIX G

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 88-3950

HERBERT M. COLLINS; H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; MILTON A. REID, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NORFOLK BRANCH; GEORGE BANKS; JULIAN HAZEL

Plaintiffs - Appellants

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; MASON C. ANDREWS; JOSEPH A. LEAFE; JOSEPH N. GREEN, JR.; CLAUDE J. STAYLOR, JR.; ROBERT E. SUMMERS; ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM; MARTHA H. BOONE; PAUL M. LIPKIN, members of the City of Norfolk Electoral Board; VINCENT J. THOMAS, Mayor of the City of Norfolk

Defendants - Appellees

FILED

AUG 18 1989

U.S. Court of Appeals
Fourth Court

APPEAL FROM the United States District Court for the Eastern District of Virginia, at Norfolk.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, at Norfolk, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and remanded.

/s/ John M. Greacen
CLERK

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3950

HERBERT M. COLLINS; H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; MILTON A. REID; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NORFOLK BRANCH; GEORGE BANKS; JULIAN HAZEL

Plaintiffs - Appellants

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; MASON C. ANDREWS; JOSEPH A. LEAFE; JOSEPH N. GREEN, JR.; CLAUDE J., JR.; ROBERT E. SUMMERS; ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM; MARTHA H. BOONE, PAUL M. LIPKIN, members of the City of Norfolk Electoral Board; VINCENT J. THOMAS, Mayor of the City of Norfolk

Defendants - Appellees

FILED

OCT 3 1989

U.S. Court of Appeals
Fourth Court

CORRECTED ORDER

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this court. In a requested poll of the court, Judges Russell, Widener, Hall, Chapman, and Wilkins voted to rehear the case in banc. Chief Judge Ervin and Judges Winter, Phillips, Murnaghan, and Sprouse voted against rehearing in banc. Judge Wilkinson disqualified himself from participation in the poll. Senior Judge Butzner did not vote on the petition for rehearing in banc. A majority of the judges who are in active service did not vote to grant rehearing in banc, and

The panel considered the petition for rehearing and is of the opinion that it should be denied. Judge Chapman dissents from the order denying rehearing by the panel.

IT IS ADJUDGED AND ORDERED that the petition for rehearing by the panel and the petition for rehearing in banc are denied.

The motion to stay the mandate is granted pending the timely filing of a petition for certiorari and action on the petition by the Supreme Court.

Entered at the direction of Senior Judge Butzner.

FOR THE COURT - BY DIRECTION

CLERK

APPENDIX I

VOTING RIGHTS ACT

§ 1973. * * * *

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b (f) (2) of this title, as provided in subsection (b) of this Section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

APPENDIX J

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court

(a) Effect. [Effective until August 1, 1985. See, also, subdivision (a) below.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(a) Effect. [Effective on August 1, 1985. See, also, subdivision (a) above.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * * *

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3950

Herbert M. Collins, et al,
Plaintiffs - Appellants,

v.

City of Norfolk, et al,
Defendants - Appellees.

FILED

DEC 6 1988

U.S. Court of Appeals
Fourth Circuit

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Upon consideration of appellees' motion to file brief with addendum and appellants' response to the motion,

IT IS ORDERED that appellees' motion to file brief with addendum is granted.

For the Court

/s/ JOHN M. GREACEN
CLERK

APPENDIX L
ABSTRACT OF NORFOLK CITY COUNCIL ELECTION—May 10, 1988

COUNTY/CITY RESULTS SHEET

COMMONWEALTH OF VIRGINIA
CITY COUNCIL ELECTION
MAY 10, 1988

NORFOLK
COUNTY/CITY

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 1 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
001 CAMPOSTELLA MIDDLE SCHOOL				6	396	187	171	0	43	285	40	45	180/27	460
002 BERKLEY RECREATION CENTER				8	275	131	167	1	32	259	38	31	225/66	411
003 CHESTERFIELD MGT ELEMENTARY SCHOOL				8	196	143	114	1	17	146	30	14	90/39	266
004 BOWLING PARK ELEMENTARY SCHOOL				19	427	282	271	4	73	257	154	24	246/123	627
005 BRAMBLETON MULTI PURPOSE CENTER				5	132	79	82	0	8	105	17	5	73/9	171
006 UNION CHAPEL A M E CHURCH				7	215	149	139	5	15	115	40	19	73/24	267
007 LINDERWOOD ELEMENTARY SCHOOL				8	188	142	121	2	24	157	54	23	138/27	298
008 YOUNG PARK ELEMENTARY SCHOOL				5	392	285	242	2	70	348	115	73	176/72	593
009 HUNION YMCA				0	80	50	48	0	24	60	21	22	61/33	133

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 2 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
010 MUNICIPAL AUDITORIUM				12	97	108	106	8	8	10	4	3	37/3	133
011 OHEF SHOLOM TEMPLE				13	119	118	132	2	6	10	4	1	33/3	147
012 ST ANDREW'S EPISCOPAL CHURCH				23	257	288	307	12	12	28	7	8	83/3	344
013 MAURY HIGH SCHOOL				17	151	167	184	11	22	22	10	9	70/3	222
014 PARK PLACE MULTI-PURPOSE CENTER				11	268	215	197	3	29	102	51	30	63/24	331
015 STUART SCHOOL RECREATION CENTER				17	219	202	191	9	18	89	16	7	63/6	279
016 BLESSED SACRAMENT SCHOOL				13	186	184	143	8	24	76	18	16	80/54	261
017 ROSE OF SHARON MISS BAPTIST CHURCH				11	150	126	64	2	66	92	21	11	61/24	210
018 CANTERBURY CENTER				18	188	205	222	4	7	10	4	3	82/6	243
019 LARCHMONT LIBRARY PUBLIC MEETING ROOM				12	179	195	208	4	7	10	2	1	44/6	223
020 LARCHMONT SCHOOL RECREATION ROOM				23	204	235	250	4	9	17	5	2	58/6	271
021 ZION GRACE UNITED METHODIST CHURCH				42	354	405	402	7	20	50	14	8	165/3	491

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 3 of 8	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
022 GRANBY ELEMENTARY SCHOOL				42	210	211	215	14	23	98	13	11	116/18	323
023 GRANBY HIGH SCHOOL				23	214	242	263	11	9	20	9	8	78/8	295
024 SUBURBAN PARK ELEMENTARY SCHOOL				30	200	238	239	10	11	55	12	5	101/15	304
026 LAKEWOOD RECREATION CENTER				37	353	327	338	16	29	150	86	14	158/36	509
027 WILLARD ELEMENTARY SCHOOL				22	184	168	175	6	18	43	20	13	49/9	229
028 LAFAYETTE PRESBYTERIAN CHURCH				18	145	149	147	4	14	59	20	11	62/15	215
029 BALLENTINE ELEMENTARY SCHOOL				8	148	138	133	5	33	67	22	14	47/30	215
030 INGLESIDE RECREATION CENTER				28	243	202	211	4	39	148	42	18	79/24	345
031 POPLAR HALLS ELEMENTARY SCHOOL				17	288	239	247	8	55	180	31	24	108/39	405
032 EASTON ELEMENTARY SCHOOL				30	155	158	165	9	24	48	12	5	58/9	223
033 FAIRLAWN RECREATION CENTER				40	85	124	117	12	10	28	18	11	48/0	183

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 4 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
034 W W HOUSTON BOY'S CLUB				18	59	66	66	4	5	29	3	4	34/0	97
035 COLEMAN PLACE PRESBYTERIAN CHURCH				28	71	87	81	4	12	21	17	8	12/0	113
036 COLEMAN PLACE ELEMENTARY SCHOOL				7	61	62	58	7	7	23	11	4	26/3	90
037 SHERWOOD FOREST ELEMENTARY SCHOOL				31	65	92	101	5	14	20	8	5	19/8	122
038 SHERWOOD FOREST COMMUNITY CENTER				32	114	135	130	12	14	26	11	8	25/0	169
039 NORVIEW UNITED METHODIST CHURCH				94	191	208	215	18	18	94	21	19	117/45	347
040 BARRON F BLACK BRANCH LIBRARY				44	170	184	181	13	12	84	29	15	89/15	282
041 AZALEA GARDEN MIDDLE SCHOOL				23	141	148	170	7	4	17	7	5	39/0	187
042 ROSEMONT MIDDLE SCHOOL				10	395	270	268	1	40	279	108	23	276/84	588
043 WESLEY MEMORIAL UNITED METH. CHURCH				12	53	64	62	0	3	1	3	5		78
044 CROSSROADS RECREATION CENTER				46	88	119	122	18	10	33	16	11	52/3	172

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 5 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
045 MARY CALCOTT ARTS & CRAFTS CENTER				10	65	73	79	8	0	10	2	2	19/3	91
046 TARNALLTON RECREATION CENTER				83	132	216	207	17	19	39	19	7	84/0	275
047 LARRYMORE ELEMENTARY SCHOOL				35	215	220	236	11	18	47	23	113	47/6	280
048 LITTLE CREEK SCH RECREATION CENTER				52	115	154	153	13	20	23	9	7	24/0	190
049 E OCEAN VIEW RECREATION CENTER				13	46	51	53	4	5	8	8	4	7/0	65
050 BAYVIEW ELEMENTARY SCHOOL				96	211	300	326	32	16	57	38	20	125/3	410
051 BAYVIEW UNITED CHURCH OF CHRIST				53	129	162	156	15	9	17	15	7	46/3	204
052 NORTHSIDE MIDDLE SCHOOL				58	188	236	254	32	19	31	10	8	78/3	299
053 OCEANAIR ELEMENTARY SCHOOL				31	123	139	139	11	12	31	13	10	31/3	181
054 OCEAN VIEW RECREATION CENTER				17	84	106	114	10	9	13	7	4	50/3	139

PRECINCT NUMBER AND NAME	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 6 of 6	
	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
055 OCEAN VIEW ELEMENTARY SCHOOL				37	198	227	233	37	15	22	10	8	44/5	278
056 ABSENTEE VOTING PRECINCT - CITY HALL				46	143	168	178	11	19	181	28	14	272/3	347
TOTALS				1,443	9,925	9,557	9,610	482	1,097	4,198	1,342	696		14,619

WRITE-INS

	NO. OF VOTES	PRECINCT
CHRISTOPHER STEVEN DAVIS	1	28
DAVID R. HAHN	1	50
JULIAN HIRST	2	23
GARY DAVID MILLER	1	50
EARL V. SWIFT	2	10,12
GEORGE R. VAUGH[illegible]	1	34
BRUCE WILCOX	1	45
NANCY WILCOX	1	45
BOB WILSON	1	50
RANDY WRIGHT	3	26,30,46
	14	

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APPENDIX M

DEFENDANTS' EXHIBIT NO. 470

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1984 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
	Candidate (B = Black) #	Homogeneous Black Precincts (N = 10)	Homogeneous White Precincts (N = 12)	Entire City (Total Votes) +
	Anders, Alvin	1.1	7.9	5.0 (1,701)
	Armstrong, Luther	2.1	20.7	14.3 (4,916)
	Butts, Evelyn (B)	72.1	24.2	46.9 (16,084)
ELECTED	Foster, John (B)	79.9	26.6	49.9 (17,134)
	Hall, Theodore (B)	8.9	3.0	6.7 (2,291)
ELECTED	[Howell, Elizabeth]	39.8	68.8	54.3 (18,641)
	Lass, Deborah	0.6	3.7	2.6 (882)
ELECTED	[Leafe, Joseph]	19.6	86.3	52.4 (17,967)
	Rose, Joseph (B)	18.7	3.3	10.2 (3,513)
	Schippell, H. R.	0.4	11.3	8.2 (2,824)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 54 precincts plus absentee ballots. The total number of voters casting ballots was 34,304.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1982 NORFOLK CITY COUNCIL ELECTIONS (FOUR SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 10)	(N = 10)	Entire City (Total Votes) +
ELECTED	[Andrews, Mason C.]	5.8	79.9	47.6 (17,728)
	Butts, Evelyn T. (B)	87.6	11.2	40.0 (14,876)
	Collins, Herbert M. (B)	27.5	2.6	12.8 (4,749)
	Conley, Lena Rosa K.	1.7	2.9	2.9 (1,079)
	Gay, James F. (B)	29.6	4.1	14.7 (5,488)
ELECTED	[Green, Jos. N., Jr.] (B)	88.2	31.1	50.1 (18,665)
	Jarvis, Patricia Anne	6.3	5.7	5.5 (2,054)
	Mottesheard, Shirley S.	0.5	8.6	6.0 (2,250)
	Papafil, Carolyn A.	6.6	8.7	10.1 (3,774)
	Ryan, William C.	0.9	41.1	21.0 (7,836)
	Schippell, H. R.	0.2	7.5	6.4 (2,400)
ELECTED	[Staylor, Claude J., Jr.]	1.6	75.3	49.0 (18,247)
ELECTED	[Summers, Robert E.]	2.1	72.1	45.5 (16,923)
	Williams, William R.	8.7	12.3	13.2 (4,929)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 52 precincts plus absentee ballots. The total number of voters casting ballots was 37,234.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1980 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
	Candidate (B = Black) #	Homogeneous Black Precincts (N = 10)	Homogeneous White Precincts (N = 10)	Entire City (Total Votes) +
	Banks, George H. (B)	34.5	2.3	12.0 (3,449)
	Barco, Herman J.	1.5	3.8	3.2 (930)
	Butts, Evelyn T. (B)	92.9	9.5	39.7 (11,380)
	Conley, Lena Rosa K.	1.2	5.1	4.4 (1,257)
	Hellinger, Joseph W.	5.1	8.8	7.4 (2,114)
ELECTED	[Howell, Elizabeth M.]	72.9	31.7	47.6 (13,637)
ELECTED	Leafe, Joseph A.	1.7	68.1	41.2 (11,785)
	Mottesheard, Shirley S.	0.9	12.2	9.9 (2,840)
	Phillips, G. Conoly	2.7	56.3	36.0 (10,312)
	Sykes, A. Winston	1.0	13.2	11.1 (3,184)
ELECTED	[Thomas, Vincent J.]	4.1	71.3	44.7 (12,795)
	Trice, P.D., Jr.	0.4	2.9	2.6 (753)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 52 precincts plus absentee ballots. The total number of voters casting ballots was 28,638.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1978 NORFOLK CITY COUNCIL ELECTIONS (FIVE SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	Entire City
	Candidate (B = Black) #	(N = 10)	(N = 11)	(Total Votes) +
ELECTED	[Andrews, Mason C.]	43.5	72.2	59.8 (19,483)
	Coneys, John Joseph	4.1	13.7	11.6 (3,794)
	Conley, Lena Rosa K.	3.1	5.6	5.6 (1,826)
	Copeland, Howard E.	45.0	32.0	35.8 (11,683)
ELECTED	[Green, Jos. N., Jr.] (B)	96.1	32.2	51.5 (16,776)
	Hellinger, Joseph W.	15.0	12.6	13.9 (4,543)
ELECTED	[Howell, Elizabeth M.]	68.5	26.6	42.5 (13,843)
	Middleton, E. George, Jr.	3.3	64.1	41.5 (13,526)
ELECTED	[Staylor, Claude J., Jr.]	1.7	67.5	48.2 (15,708)
ELECTED	[Summers, Robert E.]	4.0	64.6	44.2 (14,403)
	White, Robert M.	42.8	40.5	40.9 (13,331)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 32,604.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1976 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in*		
	Candidate (B = Black) #	Homogeneous Black Precincts (N = 10)	Homogeneous White Precincts (N = 10)	Entire City (Total Votes) +
	Bond, Michael E.	0.2	6.8	4.9 (1,710)
	Conley, Lena Rosa K.	0.6	4.5	3.9 (1,641)
	Hellinger, Joseph W.	3.7	2.3	2.6 (1,104)
	[Hill, Irvine B.]	76.3	20.0	40.5 (17,183)
	[Hurst, R. Stanley]	75.6	21.7	41.5 (17,624)
ELECTED	[Jordan, Jos. A., Jr.] (B)	97.3	24.3	47.9 (20,332)
ELECTED	Phillips, G. Conoly	2.9	77.9	53.3 (22,609)
	Sams, Bruce (B)	5.4	1.4	2.8 (1,185)
	Scarangello, Anthony J.	0.4	13.8	11.9 (5,058)
ELECTED	Thomas, Vincent J.	1.6	79.0	52.1 (22,137)
	Wallace, Richard A.	0.4	2.2	1.8 (752)
	Wise, William Perry	--- WITHDREW ---		(4)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 42,456.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1974 NORFOLK CITY COUNCIL ELECTIONS (FOUR SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 32)	Entire City (Total Votes) +
ELECTED	Andrews, Mason C.	16.7	58.0	49.3 (18,289)
	Baxter, William	1.0	2.5	2.2 (799)
	Blassingham, Mel. T., Jr.	0.9	23.2	18.8 (6,977)
	Bond, Lenious G. (B)	73.4	7.6	24.1 (8,956)
	Cuffey, Sonnie G. (B)	12.8	2.3	4.9 (1,818)
	Delamorton, Howard F. B.	0.7	0.8	0.7 (271)
	Dozier, Willie L., Sr. (B)	9.2	0.6	2.2 (808)
	Gulick, Richard I.	0.4	5.5	4.7 (1,731)
	Hellinger, Joseph W.	4.6	2.9	3.8 (1,411)
ELECTED	Howell, Elizabeth M.	58.2	38.2	41.9 (15,547)
	[Hughes, George S.]	1.1	40.8	31.7 (11,771)
	Lassiter, Arnold R.	1.9	18.3	13.1 (4,877)
	Mack, Roland	0.4	1.0	0.8 (295)
	Melchiorre, Peter M.	0.3	1.8	1.5 (564)
	Melchor, Bruce E., III	0.4	6.6	5.8 (2,170)
	Moss, Charles B.	1.4	12.9	10.4 (3,851)
	Nichols, Dorothy Sue S.	0.5	7.6	5.5 (2,035)
	Reid, Milton A. (B)	36.4	3.0	10.6 (3,946)
ELECTED	Staylor, Claude J., Jr.	56.5	66.8	63.5 (23,566)
ELECTED	[Summers, Robert E.]	7.6	51.1	40.2 (14,905)
	Wallace, Richard A.	1.1	19.6	15.2 (5,638)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 54 precincts plus absentee ballots. The total number of voters casting ballots was 37,105.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1972 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 30)	Entire City (Total Votes) +
	Bell, Helen I.	1.2	9.1	6.8 (2,182)
	Byrum, Elwood W.	- - - WITHDREW - - -		(2)
	Conley, Lena Rosa K.	0.5	0.8	0.7 (238)
	Crank, Robert B.	0.3	1.2	0.8 (268)
	Hespenheide, Franz S.	0.8	3.1	2.5 (800)
ELECTED	Hill, Irvine B.	32.2	55.6	47.0 (15,104)
	[Hill, R. Braxton, Jr.]	10.0	44.6	34.6 (11,116)
ELECTED	[Hurst, R. Stanley]	35.6	59.0	50.7 (16,297)
ELECTED	[Jordan, Jos. A., Jr.] (B)	98.3	22.3	46.3 (14,867)
	Ogg, Kathryn	0.7	15.5	9.88 (3,149)
	Parsons, L. Shields, Jr.	6.1	39.8	30.3 (9,732)
	Shalhoup, Jewell B.	0.5	1.7	1.2 (394)
	Wallace, Richard B.	0.8	26.3	18.3 (5,891)

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Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 32,120.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1970 NORFOLK CITY COUNCIL ELECTIONS (SIX SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 30)	Entire City (Total Votes) +
	Capps, John W. (B)	13.9	3.7	6.6 (2,020)
	Conley, Mrs. George W.	0.8	2.7	2.2 (676)
	Gottlieb, Raymond	34.9	28.3	31.2 (9,535)
	Hanckel, Allan R.	33.7	25.3	28.5 (8,715)
ELECTED	Hill, R. Braxton	6.3	49.7	39.4 (12,062)
ELECTED	[Hughes, George R.]	8.1	63.2	49.1 (15,010)
ELECTED	Hurst, R. Stanley	40.8	43.2	41.9 (12,831)
	Kissinger, M. Theo., Jr.	31.2	10.6	16.5 (5,033)
	Mack, Roland	1.1	2.5	2.1 (629)
ELECTED	[Martin, Roy B.]	10.8	55.1	44.4 (13,572)
ELECTED	[Nusbaum, V. H.]	10.1	57.9	47.0 (14,377)
	Ogg, Kathryn N.	1.5	21.0	14.9 (4,549)
	Perry, Kenneth N.	5.7	46.2	36.5 (11,158)
	Scarangella, Anthony J.	0.8	17.2	11.3 (3,467)
	Sichta, Robert	26.5	8.2	13.9 (4,248)
ELECTED	[Summers, Robert E.]	5.5	66.8	50.2 (15,360)
	Walton, Roland J. (B)	92.4	14.0	36.4 (11,142)
	Wells, John S.	1.0	3.6	2.9 (899)
	Willis, Berry D., Jr.	6.4	28.0	21.4 (6,535)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 30,595.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1968 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 30)	Entire City (Total Votes) +
ELECTED	[Ballard, William P.]	3.5	70.0	48.1 (13,476)
ELECTED	[Barfield, Sam T.]	4.1	72.7	49.8 (13,942)
	Ellis, James T.	2.4	4.8	4.1 (1,157)
ELECTED	Jordan, Jos. A., Jr. (B)	91.9	28.7	48.4 (13,551)
	Lasky, Mortimer	1.3	7.7	6.1 (1,704)
	[Schweitzer, Paul]	4.9	63.7	44.7 (12,527)
	Warrick, Thomas D.	1.5	16.1	10.2 (2,857)
	Willis, Berry D., Jr.	28.9	32.1	28.0 (7,875)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 38,024.

NOTE: DATA FOR THIS ELECTION ARE BASED ON NEWSPAPER REPORTS.

TABLE A

1986 NORFOLK CITY COUNCIL ELECTION RESULTS (FOUR SEATS UP)
PERCENTAGE OF VOTERS BY RACE SUPPORTING PARTICULAR CANDIDATES UNDER HOMOGENEOUS PRECINCT ANALYSIS* AND REGRESSION ANALYSIS

		Black Voters		White Voters		Entire City	
		Homogeneous (N = 10)	Regression (Unweighted) (N = 54)	Homogeneous (N = 12)	Regression (Unweighted) (N = 54)	Total Votes +	
Elected	[Andrews]	38.4	35.3	72.6	70.6	56.95	(17,552)
	Conley	2.3	2.6	5.0	6.8	4.74	(1,462)
	Dabu	6.3	6.1	10.2	13.4	9.87	(3,043)
Elected	Fraim	29.8	25.9	67.0	62.0	48.67	(15,001)
Elected	[Green] (B)	90.3	93.4	27.3	21.1	49.45	(15,242)
	Hailey	34.2	39.1	30.8	27.2	31.92	(9,839)
	Harris (B)	84.1	89.1	4.8	1.1	35.69	(10,999)
Elected	Phillips	29.3	32.7	50.3	51.8	44.03	(13,570)
	Schippell	2.7	3.1	3.9	5.9	4.65	(1,432)
	Wright	3.8	1.1	60.3	69.9	42.61	(13,133)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

+ The citywide percentage and vote total are based on the returns from 54 precincts plus absentee ballots. The total number of voters casting ballots was 30,821.

Incumbent councilors are designated by brackets.

(B) designates black candidates.